ATTORNEY ADVERTISING IN THE 21ST CENTURY: ETHICAL CONSIDERATIONS

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Alabama Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or

(d) communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4.

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.1 is a direct counterpart to Temporary DR 2-101, which was substantially adopted from Model Rule 7.1.

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Alabama Rule 7.2 Advertising

A lawyer who advertises concerning legal services shall comply with the following:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor displays, radio, television, or written communication not involving solicitation as defined in Rule 7.3.

(b) A true copy or recording of any such advertisement shall be delivered or mailed to the office of the general counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated; the contemplated duration thereof and the identity of the publisher or broadcaster of such advertisement, either within the advertisement or by separate communication accompanying said advertisement, shall be stated. Also, a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content, as provided hereinafter by Rule 7.2(d), for six (6) years after its last dissemination.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) No communication concerning a lawyer's services shall be published or broadcast, unless it contains the following language, which shall be clearly legible or audible, as the case may be: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

(f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days following the date of the last publication or broadcast.

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who

have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.2 is based on Temporary DR 2-102, which was substantially adopted from Model Rule 7.2.

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Alabama Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule.

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days before to the mailing of the communication;

(ii) the written communication concerns a civil proceeding pending in a state or federal court, unless service of process was obtained on the defendant or other potential client more than seven (7) days prior to the mailing of the communication;

(iii) the written communication concerns a criminal proceeding pending in a state or federal court, unless the defendant or other potential client was served with a warrant or information more than seven (7) days prior to the mailing of the communication;

(iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(v) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;

(vi) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;

(vii) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement

or claim or is improper under Rule 7.1; or

(viii) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(i) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed with the office of general counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the office of general counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends the identical communication to additional prospective clients, the lawyer shall, once a month, file with the office of general counsel a list of the names and addresses of those clients contacted since the previous list was filed;

(ii) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by any other form of restricted delivery or by express mail;

(iii) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar;

(iv) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document, and the manner of mailing the written communication shall not make it appear to be an official document;

(v) the word "Advertisement" shall appear prominently in red ink on each page of the written communication, and the word "Advertisement" shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word "Advertisement" shall appear prominently in red ink on the address panel in 14-point or larger type;

(vi) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked "SAMPLE." The word "SAMPLE" shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words "DO NOT SIGN" shall appear on the line provided for the client's signature;

(vii) the first sentence of the written communication shall state: "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]";

(viii) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer obtained the information

prompting the communication;

(ix) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem; and

(x) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication.

COMMENT

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the nonlawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services. Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising, rather than direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely. Advertising is in the public view and thus subject to scrutiny by those who know the lawyer. This informal review is likely to help guard against statements and claims that might constitute false or misleading communications in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-person scrutiny and consequently are much more likely to approach (and occasionally cross) the line between accurate representations and those that are false and misleading.

Direct written communication seeking employment by specific prospective clients generally presents less potential for abuse or overreaching than in-person solicitation and is therefore not prohibited for most types of legal matters, but is subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if the communication is not mailed until thirty (30) days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown can exist in this type of solicitation.

Common examples of written communications that must meet the requirements of subparagraph (b) of this rule are direct mail solicitation sent to individuals or groups selected because they share common characteristics, e.g., persons named in traffic accident reports or notices of foreclosure. Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule. Also not covered by this rule are responses by lawyers and law firms to requests for information from a prospective client or newsletters or brochures published for clients, former clients, those requesting it, or those with whom the lawyer or law firm has a familial or current or prior professional relationship.

Letters of solicitation and the envelopes in which they are mailed should be clearly marked "Advertisement." This will avoid the perception by the recipient that there is a need to open the envelope because it is from a lawyer or law firm, when the envelope contains only a solicitation for legal services. With the envelopes and letters clearly marked "Advertisement," the recipient can choose to read the solicitation or not to read it, without fear of legal repercussions.

In addition, the lawyer or law firm sending the letter of solicitation shall reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee.

This Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or the law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There is no comparable rule in the former Alabama Code of Professional Responsibility. Rule 7.3, before its amendment effective May 1, 1996, was a direct counterpart to Temporary DR 2-103, which was substantially adopted from Model Rule 7.3. The amendment effective May 1, 1996, changed the rule substantially from what was Temporary DR 2-103.

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Alabama Rule 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation; or

(c) a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority, but only if such certification is granted by an organization previously approved by the Alabama State Bar Board of Legal Certification to grant such certifications.

COMMENT

This rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist," practices a "specialty," or "specializes in" a particular field is not permitted unless in accordance with rule 7.4(c). These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Paragraph (c) provides for certification as a specialist in a field of law where the Alabama State Bar Board of Legal Specialization has granted an organization the right to grant certification. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience, and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding certification.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Original Rule 7.4 is a direct counterpart to Temporary DR 2-104, which was substantially adopted from original Model Rule 7.4. On August 31, 1993, § (c) of Rule 7.4 was amended in conformity with the August 12, 1992, amendments of Model Rule 7.4 to allow the advertisement of specialists, with the exception that Model Rule 7.4(c)(2) was not adopted. Model Rule 7.4(c)(2) would have allowed the advertisement of a specialty designated by a nonapproved organization if the appropriate disclaimer was included. To allow this type of advertisement would cause confusion and would be misleading to the public.

Deletion of "limited to" or "concentrated in" particular fields conforms to the 1989 amendment of Model Rule 7.4 deleting the same language.

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Alabama Rule 7.6 Professional Cards of Nonlawyers

A lawyer shall not cause or permit a business card of a nonlawyer which contains the lawyer's or firm's name to contain a false or misleading statement or omission to the effect that the nonlawyer is a lawyer. A business card of a nonlawyer is not false and misleading which clearly identifies the nonlawyer as a "Legal Assistant," provided that the individual is employed in that capacity by a lawyer or law firm, that the lawyer or law firm supervises and is responsible for the law related tasks assigned to and performed by such individual, and that the lawyer or law firm has authorized the use of such cards.

COMMENT

Lawyers employ various persons who are nonlawyers to engage in activities on behalf of the lawyers. These nonlawyer employees are not subject to the disciplinary process of the Alabama State Bar, although the lawyer may be disciplined for their conduct in appropriate cases. See Rule 5.3. These employees include secretaries, investigators, legal assistants, paralegals, librarians, law clerks, messengers, accountants, bookkeepers, office managers, firm administrators, etc. In many cases, these employees will come into contact with clients and with the general public. In these cases, a professional card or calling card may be useful to the employee, the client, and the public.

The Rule is directed against false and misleading business cards. A lawyer must not permit or cause a business card of a nonlawyer employee to be either false or misleading. Particular care should be taken to ensure that no false impression is given that a nonlawyer is a lawyer. In the design of business cards, the position of nonlawyer employee should be legibly and prominently indicated in close proximity to the employee's name. Cards that visually present a lawyer's or law firm's name in such a prominent manner as to obscure the employee's nonlawyer status are prohibited. The card should serve the function of identifying the name of the individual employee, but it should not be susceptible to an interpretation by the casual observer that it is the card of a lawyer, as opposed to that of an employee of a lawyer or law firm.

Because the term "legal assistant" contains the designation "legal" and thus might reasonably be considered as prohibited by this Rule, a safe harbor was provided so as to permit use of the term on business cards.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.6 is a direct counterpart to Temporary DR 2-106. There is no Model Rule counterpart.

ATTORNEY ADVERTISING: OGC OPINIONS

Opinion Number: 2012-01

Search for: [redacted]

Advertising on Groupon and Similar Deal of the Day Websites

ETHICS OPINION

R0 2012-01

Advertising on Groupon and Similar Deal of the Day Websites

QUESTION:

May an attorney use websites such as Groupon or other "daily deal" websites to market discounted legal services in the form of redeemable certificates to prospective clients?

ANSWER:

No. The use of daily deal websites, such as Groupon, violates or potentially violates a number of rules of professional conduct.

DISCUSSION: Recently, the Office of General Counsel has been asked to opine on the ethical propriety of "daily deal" websites, such as Groupon, as a marketing tool for law firms. These "daily deal" websites typically contact the consumer via email and give the consumer the opportunity to purchase a certificate for services or products from a retailer at a discounted rate of 50% or greater. The proceeds from each sale are typically divided on a 50-50 split between the website and the retailer. For example, a law firm would agree to sell a coupon entitling the purchaser to $500 worth of legal services for a discounted rate of $250. The purchaser or prospective client would pay the website $250 and would receive a certificate for $500 to redeem for legal services with the law firm. The certificate may or may not have an expiration date. From the sale, the website would keep 50% of the revenue, $125 in this case, and remit the remaining $125 to the law firm.

Several bar associations have recently issued opinions concerning the ethical propriety of lawyers using these "daily deal" websites. New York, North Carolina, and South Carolina have issued ethics opinions approving the use of websites like Groupon, while Indiana has issued an opinion disapproving of such sites. All acknowledge, however, that marketing discounted legal services through these sites is fraught with ethical landmines. First and foremost among the issues raised is whether the use of Groupon to market and sell legal services constitutes the sharing of legal fees with a non-lawyer in violation of Rule 5.4(a), Ala. R. Prof. C.

In Formal Ethics Opinion 10, North Carolina found that the portion of the fee retained by the website is merely an advertising cost since "it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee . . ." In Ethics Advisory Opinion 11-05, South Carolina also determined that the website's share of the fee paid by the purchaser was an "advertising cost" and not the sharing of a legal fee with a non-lawyer. The Disciplinary Commission finds these arguments unconvincing. In Alabama State Bar Association v. R.W. Lynch Company, Inc., the Supreme Court of Alabama addressed whether a television advertisement touting the "Injury Helpline" was a for-profit referral service in violation of Rule 7.2(c), Ala. R. Prof. C. 655 So. 2d 982 (Ala. 1995). While there is no claim that sites like Groupon are for-profit referral services, R.W. Lynch is instructive on whether the fees charged by such sites are truly "advertising fees".

The Supreme Court concluded that R.W. Lynch's "Injury Helpline" was not a "for-profit" referral system but rather a permissible form of group advertising. In reaching its decision, the Court noted that lawyers who participate in the helpline pay a flat-rate fee for the advertising, regardless of the number of calls forwarded to them. Id. Pursuant to Rule 7.2(c), a lawyer "may pay the reasonable cost of any advertisement". In this instance, Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website's traffic. Instead, as noted by the Indiana State Bar Ass'n Ethics Committee, Groupon and other sites take a percentage (usually 50%) of each and every purchase. The percentage taken by the site is not tied in any manner to the "reasonable cost" of the advertisement. As a result, the Disciplinary Commission finds that the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer.

The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer's trust account until earned. See Formal Opinion 2008-03. However, under the fee model employed by Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase making it impossible for the lawyer to place the entire unearned legal fee into trust as required by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a) [Fees] and/or failing to return the client's property as mandated by Rule 1.16(d) [Declining or Terminating Representation].

Another ethical dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or having met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer's former and current clients is great.

Additionally, the Disciplinary Commission is concerned that the use of such daily deal sites could result in violations of Rule 1.1 [Competence] and/or Rule 1.3 [Diligence]. Because there is no meaningful consultation prior to the payment of legal fees, the purchaser may be retaining a layer that does not possess the requisite skills or knowledge necessary to competently represent the purchaser. There is no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired.

Likewise, the lawyer is also unable to judge whether he will be able to diligently represent the client. Unless the lawyer places restrictions on the type of services offered and on the number of deals available for purchase, the lawyer may find that his caseload becomes unmanageable. Rule 7.2(f), Ala. R. Prof. C., provides as follows:

RULE 7.2

ADVERTISING

A lawyer who advertises concerning legal services shall comply with the following:

(f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days following the date of the last publication or broadcast.

Pursuant to Rule 7.2(f), a lawyer will be bound to honor all purchases made through sites like Groupon. If a large number of purchases are made through Groupon, the lawyer may not have the time or resources to diligently represent each new client resulting in violations of Rules 1.1 [Competence], 1.3 [Diligence], and 1.4 [Communication], Ala. R. Prof. C.

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Opinion Number: 2008-01

Advertising ability to communicate in a foreign language

QUESTION:

May an attorney advertise the ability to communicate in a foreign language if an employee of the attorney, and not the attorney, will be communicating with clients in the second language? If so, what ethical obligations and responsibilities are imposed upon the supervising attorney?

ANSWER:

An attorney may advertise the ability of a nonlawyer employee to communicate in a foreign language if the advertisement makes it clear that the nonlawyer employee and not the attorney will be communicating with the client in the foreign language. Additionally, if the advertisement is placed using the foreign language being advertised, then the disclaimer required by Rule 7.2(e) must also be in that same foreign language. If the advertisement being placed uses both English and the foreign language, then the disclaimer must be communicated through both the foreign language and English. Finally, any attorney using a nonlawyer employee to communicate with a client in a foreign language assumes all responsibility for the accuracy of the information relayed between the nonlawyer employee and client. DISCUSSION:

Rule 7.2, Alabama Rules of Professional Conduct, provides, in pertinent part, as follows:

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

As such, an attorney cannot imply an ability to speak a foreign language when, in fact, it is an employee of the attorney that will be communicating with the client in the foreign language. Rather, if the attorney wishes to advertise the fact that his law firm can communicate with a client in a particular language, the advertisement must state with particularity whether the attorney has the ability to communicate in the foreign language or whether an employee has that ability. Additionally, if the advertisement is going to be published via the foreign language, the disclaimer required by Rule 7.2(e) must also be translated into the foreign language. If an advertisement is going to be published using both English and the foreign language, then the disclaimer should be included using both the foreign language and English formats.

Any attorney using a nonlawyer employee to communicate with a client in a foreign language should also be aware of Rule 5.3, Ala. R. Prof. C., which provides as follows:

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Under Rule 5.3, an attorney is held responsible for the conduct of any non-lawyer employee to the same extent as if the attorney engaged in the conduct himself. In the instant situation, by using a nonlawyer employee to communicate with a client, the lawyer is under a duty to ensure that information received from the client is accurately communicated to the lawyer

through the nonlawyer employee. Likewise, the lawyer is also responsible for ensuring that the nonlawyer employee accurately relays the lawyer's communications to the client. Any failure by the nonlawyer employee to accurately relay information between the client and the lawyer that adversely affects the rights or interests of the client could constitute an ethics violation by the lawyer.

Furthermore, pursuant to Rule 5.5(b), Ala. R. Prof. C., the lawyer employing the nonlawyer employee as a translator must also be careful to avoid assisting the nonlawyer employee in the performance of activities that constitute the unauthorized practice of law. For example, while legal advice may be relayed to a client through the use of a translator, the legal advice given must be that of the lawyer and not the translator. As such, the lawyer should always be present during conferences with the client and should not allow the nonlawyer employee to meet privately with the client. In addition, when making court appearances, the approval of the court should be sought in order to use the non-lawyer employee to translate information between the client and the lawyer and/or the court.

JWM/s

6/30/08

Opinion Number: 2006-01

Search for: Search

Direct solicitation of former and present clients

QUESTION #1:

Under what circumstances may an attorney conduct direct solicitation - via in-person contact or by telephone - for professional employment under Rule 7.3(a), Alabama Rules of Professional Conduct?

ANSWER:

Rule 7.3(a), Ala. R. Prof. C., expressly authorizes an attorney to directly solicit any family member (related by blood or marriage), former client, or current client.

DISCUSSION:

Rule 7.3(a) continues the traditional prohibition against direct solicitation of legal employment. That Rule provides in pertinent part the following:

Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule.

Direct solicitation is disfavored, in part, because the contact between attorney and prospective client is in private and therefore, not subject to public scrutiny. As such, the attorney can overreach and "can more readily mix misleading speech with factual statements." 1 The reason for prohibiting direct solicitation is also discussed in the Comment to Rule 7.3:

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile trans- mission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Rule 7.3(a), Ala. R. Prof. C., however, expressly exempts from the ban against solicitation those persons with whom the attorney has a familial relationship and/or a current or prior professional relationship. It is presumed less likely that an attorney would engage in abusive or misleading practices against a person with whom he enjoys a familial relationship. While there is a recent trend to also exclude close personal friends from the prohibition against direct solicitation, the Bar has yet to adopt such a provision. 2 Rather, the term "familial" literally denotes a family relationship, by either blood or marriage. It would be exceedingly difficult to enforce a rule that allowed direct solicitation of "close, personal friends." What constitutes a "close, personal" relationship would be subject to debate and individual interpretation. As such, the Commission believes that a "familial" relationship refers strictly to a family member by blood or marriage.

Current and former clients are also excluded from the prohibition against direct solicitation. Due to their previous or ongoing interaction with the attorney, current or former clients will have a sufficient basis upon which to judge whether to continue or reactivate a professional relationship with a particular attorney.

It should also be noted that in In Re Primus, 436 U.S. 412 (1978), the United States Supreme Court held that the solicitation of prospective clients by nonprofit organizations that engage in litigation as a form of political expression are entitled to First Amendment protection and not subject to disciplinary action under the First Amendment for improper solicitation. In Primus, the prospective client was contacted after she had been sterilized as a condition to receiving Medicaid benefits. Id. The

attorney offered to represent her, free of charge, under the auspices of the American Civil Liberties Union. Id. The ban against direct solicitation also may not apply when the attorney is not seeking and will not receive any type of financial benefit from the representation.

To the extent that RO-93-02 opined otherwise or conflicts with this opinion, it is hereby withdrawn.

JWM/s

6/21/06

Footnotes:

1 Hazard & Hodes, The Law of Lawyering, § 57.3, 4. 3rd Edition (2005).

2 ABA, Annotated Model Rules of Professional Conduct, 547, Fifth Edition (2003).

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Opinion Number: 2003-01

Various Advertising Issues Addressed

The Office of General Counsel regularly receives various requests for informal opinions concerning the requirements and limitations imposed upon attorney advertising by Rules 7.1, 7.2 and 7.3 of the Rules of Professional Conduct. The Disciplinary Commission has determined that it would be beneficial to consolidate into one formal opinion those informal advertising opinions which appear to be of profession-wide interest. Accordingly, RO-2003-01 will address those questions set forth below.

QUESTION ONE:

Are an attorney's business cards considered advertising? May an attorney leave his business cards in the offices of other professionals such as doctors and accountants?

ANSWER QUESTION ONE:

The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients. Direct solicitation of prospective clients is governed by Rule 7.3 of the Rules Professional Conduct Paragraph (a) of that Rule provides as follows:

"Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

In formal opinion RO-91-17, the Disciplinary Commission concluded that it was impermissible for an attorney to participate in a Welcome Wagon sponsorship whereby the attorney's brochure and other advertising material would be distributed by a Chamber of Commerce employee to new residents in the community. The Commission determined that such participation would constitute solicitation by an agent acting on the lawyer's behalf in violation of Rule 7.3 of the Rules of Professional Conduct. Additionally, the Office of General Counsel has held in various informal opinions that attorneys may not leave their business cards or other advertising materials in bars and nightclubs, doctors' offices or the offices of bail bondsmen because to do so would constitute face-to-face solicitation by an agent. It is, therefore, the opinion of the Disciplinary Commission that it would be ethically impermissible for an attorney to provide business cards to other professionals for distribution to their clients, customers or patients.

QUESTION TWO:

May an attorney print an advertisement for legal services on the exterior of prescription bags which a pharmacy will disperse to customers?

ANSWER QUESTION TWO:

The Disciplinary Commission is of the opinion that the ethical concerns discussed in RO-91-17, cited in the previous question, are equally applicable to this inquiry. The Commission determined that attorney participation in Welcome Wagon sponsorships is prohibited because such participation constitutes solicitation by an agent. In this instance, the pharmacist would be soliciting on behalf of the attorney in much the same manner, and to the same extent, as the Chamber of Commerce employee in RO-91-17. Furthermore, the attorney is obviously paying the pharmacist for the right to place his advertisement on the prescription bags. The fact that the attorney's advertisement is on the pharmacist's prescription bags constitutes, or could readily be construed to constitute, an endorsement or recommendation of the attorney by the pharmacist. Rule 7.2 (c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyers services . . .". Accordingly, it is the opinion of the Disciplinary Commission that it would be ethically improper for an attorney to place an advertisement for legal services on the exterior of a prescription bag or on any other item which is to be distributed to the public by a third party.

QUESTION THREE:

Is an offer to provide legal services on a pro bono basis subject to the Rules governing advertising and solicitation?

ANSWER QUESTION THREE:

Rule 7.3 of the Rules of Professional Conduct governs attorney solicitation of prospective clients. Paragraph (a) of that Rule provides, in pertinent part, as follows:

"Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

* * *

The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of "pecuniary gain" within the meaning of the above-quoted Rule. Accordingly, offers to provide such services need not comply with the requirements of subdivision (b)(2) of Rule 7.3 and need not contain the disclaimer required by Rule 7.2(e). The Commission's opinion is consistent with, and supported by, the decisions of the United States Supreme Court in NAACP v. Button, 371 U.S. 415 (1963), upholding the right of NAACP attorneys to solicit potential clients in civil rights litigation and in In re Primus, 436 U.S. 412 (1978), upholding the right of an ACLU attorney to send a solicitation letter to a woman who had been sterilized as a condition of Medicaid eligibility.

QUESTION FOUR:

Must written communications sent to former or existing clients for the purpose of soliciting representation of those clients in matters wholly unrelated to the existing or previous representation comply with the direct-mail solicitations requirements of Rule 7.3?

ANSWER QUESTION FOUR:

Direct mail solicitation of prospective clients is governed by Rule 7.3 of the Rules of Professional Conduct. Paragraph (a) of that Rule provides, in pertinent part, as follows:

"A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that the above-quoted language exempts written communication directed to former or existing clients from the requirements of Rule 7.3 regardless of whether the communication relates to the existing or prior representation or is for the purpose of soliciting the recipient as a client in a new and unrelated matter. To the extent language in RO-93-02 may be interpreted to indicate otherwise, it is the intent of the Commission to reject such an interpretation and to modify the language of RO-93-02 consistent with this opinion.

QUESTION FIVE:

The Comment to Rule 7.3 contains the following provision which has generated some confusion regarding the correct interpretation and application thereof:

"General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record-keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee." Does this provision mean that such mailings need not comply with the requirements of Rule 7.3? ANSWER QUESTION FIVE:

The Disciplinary Commission is of the opinion that this portion of the Comment does not mean that such mailings need not comply with the requirements of Rule 7.3. The Comment says that such mailings are "permitted" by the Rule. It does not say that such mailings are "exempt" from the Rule. The correct interpretation, in the opinion of the Disciplinary Commission, is that such mailings are permitted provided those mailings comply with the requirements of Rule 7.3 and also provided they comply with the requirements of Rule 7.2. Any mailing which is a "written form of communication directed to a specific recipient with whom the lawyer has no familial or current or prior professional relationship" must comply with Rule 7.3 and with Rule 7.2. The only exception to this requirement is that discussed in the previous question, i.e., written communication sent to former or existing clients or family members.

QUESTION SIX:

Another provision in the Comment to Rule 7.3 about which questions have been raised regarding the meaning thereof is the following:

"Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule."

ANSWER QUESTION SIX:

This comment refers to communications which have been solicited by the recipient. For example, if someone who needs legal assistance and, in the process of attempting to determine which attorney to employ, contacts one or more attorneys asking for information on their background and experience, the response to such a request need not comply with the Rule governing direct mail solicitation. Conversely, communications which are sent to prospective clients on an unsolicited basis must comply with the Rule.

QUESTION SEVEN:

A lawyer proposes to publish an advertisement which contains the following language: "Experienced, Driven & Knows the System - The Lawyer You Choose Makes A Difference". Is this language permissible?

ANSWER QUESTION SEVEN:

It is the opinion of the Disciplinary Commission that such "comparative" language is directly contrary to the intent and purpose of the disclaimer required by paragraph (e) of Rule 7.2, i.e., "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers." The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney does, in fact, provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.

QUESTION EIGHT:

An attorney proposes to send a brochure to prospective clients with a cover letter worded as follows:

"Enclosed is a courtesy copy of my firm's July/August 2003 newsletter. I hope that you find it informative. If you would like to receive additional copies of the newsletter in the future, please take a moment to complete and return the enclosed postcard to me, and I will see to it that additional copies are sent to you."

Must the cover letter and brochure comply with the requirements of Rule 7.3 of the Rules of Professional Conduct which govern direct mail solicitation of prospective clients by attorneys?

ANSWER QUESTION EIGHT:

Paragraph (a) of Rule 7.3 provides as follows:

"(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule."

It conclusively appears that the proposed cover letter and brochure are "written form[s] of communication directed to a specific recipient". It further appears that the intended recipient is someone "with whom the lawyer has no familial or current or prior professional relationship". Accordingly, it is the opinion of the Office of General Counsel that the letter and brochure must comply with Rules 7.2 and 7.3. As discussed in response to Question Four, written communication sent to former or existing clients or family members are exempt from all advertising and solicitation requirements.

QUESTION NINE:

An attorney proposes to send a calendar to prospective clients which would have printed on it the attorney's name, address, telephone number, fax number and a sketch of the attorney's office building. Must this proposed calendar comply with Rule 7.3?

ANSWER QUESTION NINE:

It is the opinion of the Disciplinary Commission that the proposed calendar is not a "written form of communication" within the meaning of Rule 7.3 and, therefore, need not comply with the requirements thereof. However, if the calendar includes any

reference to the attorney's areas of practice, it must contain the disclaimer as required by Rule 7.2(e).

QUESTION TEN:

May advertisements contain "success stories" about cases the attorney has successfully litigated and amounts recovered on behalf of clients? May advertisements contain "client testimonials" relating favorable comments from satisfied clients?

ANSWER QUESTION TEN:

Rule 7.1 of the Rules of Professional Conduct provides, in pertinent part, as follows:

"A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

* * *

(b) is likely to create an unjustified expectation about results the lawyer can achieve . . .".

The Comment to the above-quoted provision expands upon this prohibition:

"The prohibition in paragraph (b) of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

In a recent informal opinion, the Office of General Counsel approved an advertisement which included those elements expressly prohibited in the Comment, i.e., references to successful litigation, information concerning amounts recovered and favorable comments from satisfied clients. However, the General Counsel's opinion was predicated on the fact that the advertisement contained the following disclaimer: "These recoveries and testimonials are not an indication of future results. Every case is different, and regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

The Disciplinary Commission concurs in the opinion of the General Counsel that such "success story" and "testimonial" advertisements are permissible, provided such permission is expressly conditioned upon the inclusion of an explicit, comprehensive and appropriately worded disclaimer and provided, of course, that the statements made in the advertisements are true and accurate.

LGK/vf

6/3/03

Opinion Number: 2001-01

Attorney may barter legal services in exchange for services from other professionals and may refer clients to other professionals subject to certain conditions

QUESTION:

The Office of General Counsel has received several inquiries concerning the ethical propriety of attorneys participating in bartering clubs. There are at least two such clubs presently operating in this state. One operates under the name Business Network International (BNI) and the other is called Trade Bank International (TBI).

The Disciplinary Commission has reviewed the membership agreement and other information pertaining to the services offered by these clubs. Based upon this information, it is the understanding of the Disciplinary Commission that BNI and TBI provide administrative services for a number of chapters or clubs which operate throughout the nation and in other countries. Each club or chapter is comprised of one or more individuals from each of the various professions who are associated for the purpose of bartering their services among themselves and also for the purpose of referring clients, customers or patients, etc., to each other. For example, if a medical doctor who is a member of one of these clubs needs the services of a lawyer to draft a will, he may contact a lawyer who is a fellow member of the club and the lawyer will prepare the will without cost to the doctor. In exchange, the doctor will provide the lawyer medical services of a comparable value at no cost to the lawyer. Additionally, if the doctor has a patient who needs legal services, he would refer that patient to a lawyer who is a member of the club, and in return, if the lawyer has a client who needs medical services, he would refer that client to the medical doctor.

Professionals, other than lawyers, would be given the name of the individual referred and would then contact the individual to make an appointment or otherwise discuss their needs. In the case of lawyers, face-to-face or telephone solicitation of clients is prohibited and, therefore, the referring professional would give the lawyer's name to the potential client and it would then be up to the potential client to make contact with, or set up an appointment with, the lawyer.

Each professional pays an annual fee of $250 to the club which, according to the information reviewed, is used to pay administrative costs. No fees are paid by any professional to another professional nor is there is any compensation received for any referral.

ANSWER:

It is the opinion of the Disciplinary Commission that participation by a lawyer in bartering clubs such as BNI and TBI is not inconsistent with the lawyer's ethical obligations under the Rules of Professional Conduct of the Alabama State Bar, provided that referrals ancillary to the lawyer's representation of a client are made to another club member only after the lawyer has reached a good faith determination that referral to a member, as opposed to a nonmember, is in the best interest of the client and best suited to meet the client's needs.

DISCUSSION:

The first of the Rules of Professional Condud which would appear to be pertinent to the issues presented is Rule 7.2(c), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. However, it would not appear that the proposed arrangement constitutes a violation of this section in that the only fees paid are to the organization itself, which does not make the referrals, and nothing of value is given to the professionals who actually make the referrals. Additionally, the prohibition in Rule 7.3 against face-to-face or telephonic solicitation would not appear to be a problem in that the lawyer would not make the initial contact with the client; rather, the client must take the affirmative step of first contacting the lawyer. However, there is an additional ethical consideration which is of some concern and which, in the opinion of the Commission, could constitute a potential conflict of interest for participating lawyers. In representing clients, lawyers are ethically obligated to act at all times in the client's best interest. Furthermore, Rule 1.7(b) provides that a lawyer shall not represent a client if that representation is materially limited by the lawyer's own interests.

Participation in an organization in which clients, customers or patients are referred back and forth between professionals could place a lawyer in a situation where the lawyer's own interest is in conflict with the best interest of the lawyer's client. If, for example, a lawyer has a client who needs the services of a financial planner, it would be in the lawyer's own best interest to refer the client to a financial planner who is a member out of the bartering club. In so doing, the lawyer not only obtains access to free financial planning services for himself, but also obligates the financial planner to make a reciprocal referral. However, in actual fact, the best interest of the lawyer's client may well be served by a financial plannerwho, although not a member of the club, may be better qualified to meet the client's needs.

The information reviewed by the Commission indicates that club members are not necessarily obligated to make referrals only to other club members. Each club member has the latitude to make referrals to nonmembers if, in the member's

professional judgment, referral to a nonmember would best suit the interest or needs of the client, patient, or customer.

It is the opinion of the Disciplinary Commission that any lawyer participating in a bartering and referral club or organization must always remain free to exercise independent professional judgment in representing a client, including decisions relating to further professional services for a client. Therefore, before a lawyer may refer a client to a fellow member of a bartering club, the lawyer must make a good faith determination in the case of each referral as to whether or not the client's interests and needs would be best served by a club member, or by some other professional. Only if the lawyer can make such a good faith determination in every case would the lawyer's participation in such a bartering and referral organization be ethically permissible.

Finally, lawyers participating in a bartering club should be aware of the tax ramifications of obtaining goods and services by barter. Since such concerns present legal issues involving construction and application of the tax code, the Commission obviously expresses no opinion with regard thereto. However, participating lawyers are encouraged to carefully research these issues or to consult an accountant or other tax professional.

Opinion Number: 1999-01

Attorney may not pay for advertising of another attorney in exchange for referrals

QUESTION:

The Disciplinary Commission has determined that it would be appropriate to give further consideration to the conclusions reached in RO's 92-23 and 93-23 which address the issue of whether an attorney may pay the advertising expenses of another attorney in exchange for referrals from the attorney whose services are advertised.

ANSWER:

An arrangement whereby advertising expenses are paid by someone or some entity other than the lawyer whose services are being advertised would, in the opinion of the Disciplinary Commission, violate Rule 7.1 of the Rules of Professional Conduct, in that advertising under such circumstances would constitute "a false or misleading communication about the lawyer or the lawyer's services." Additionally, payment of advertising expenses in exchange for referrals violates the prohibition in Rule 7.2(c) against a lawyer giving "anything of value to a person for recommending the lawyer's services."

DISCUSSION:

Rule 7.1 of the Rules of Professional Conduct provides as follows:

"Rule 7.1 Communications Concerning A Lawyer's Services A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) Compares the quality of the lawyer's services with the quality of other lawyer's services, except as provided in Rule 7.4; or

(d) Communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.4."

It would appear obvious that any potential client who calls the telephone number listed in the above described advertisement scheme would be misled as to which attorney they would be dealing with and who would be representing them in their particular legal matter. While the referral concept is obviously an acceptable one in this state, advertisement by means of this type of conduit whereby one attorney or firm avoids direct participation in the advertising, other than funding the same, misleads the public as to what attorney or attorneys a potential client will be dealing with and which attorney will ultimately serve as the client's legal representative. Further, the lawyers involved in open referrals must ensure the client is aware of the referral system, division of fees, degree of participation of the attorneys involved, etc., as mandated by Rule 1.5 of the Alabama Rules of Professional Conduct. The purpose of the rules is to protect the public. Any advertising scheme which would circumvent full disclosure of relevant information to the consuming public violates, not only the rules themselves, but their spirit and purpose as well. Strict adherence to applicable rules would not allow such an advertising and referral arrangement. The circuitous referral concept envisioned therein is not a plan structured as to prevent misleading the public while maintaining the integrity of the representation of the client.

Other rules of professional conduct would be impacted, or potentially impacted, by this type of advertising and referral arrangement. First, the fact that one attorney would be paying the advertising expenses of a second attorney in exchange for referrals means that the second attorney would be receiving something of value in return for a referral or recommendation of the first attorney's services. This is clearly violative of Rule 7.2(c), which provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services ...."

Furthermore,Rule 1.10 deals with vicarious disqualification of lawyers associated in a "firm." Whether a group of lawyers constitutes a "firm" for purposes of this rule is a factual question. The Comment to Rule 1.10 notes that a group of lawyers could be considered a "firm" in one context of the rule, but not in another. If lawyers are associated in the practice of law in some way, the exact relationship can be immaterial for the purposes of disqualification under Rule 1.10. In light of the provisions of Rule 1.10, and the construction which has been placed thereon, there would appear to be a distinct possibility that attorneys or firms who participate in such an advertising arrangement would inherit one another's conflicts of interest and would thereby be vicariously disqualified from any matter in which the other had a conflict.

Based upon the above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that it is ethically impermissible for one attorney to pay the expense of advertising the services of a second attorney in exchange for the referral of cases by the second attorney. To the extent that RO-92-23 or RO-93-23 may be inconsistent with the conclusions stated herein, they are to be considered as modified in conformity herewith.

Opinion Number: 1997-01

Participation in National Attorney Network

QUESTION: "This letter will serve as my request for a formal opinion from the Disciplinary Commission conceming the question regarding our firm's licensing of software to participate in an electronic collection network. Specifically, this relates to the National Attorney Network Inc. located in Atlanta, Georgia. NAN licenses computer software that electronically connects creditors and law firms for the efficient collection of the creditors' accounts receivable. The attorney fee is negotiated and agreed upon directly between the attorney and the credit grantor/client. NAN receives a fee of three percent of the net proceeds recovered for software licensing and electronic data transfer.

The present practice is for us to remit directly to the client the net proceeds of accounts collected on a monthly basis. We would withhold the agreed upon attorney's fees due our law firm. We would also withhold the three percent NAN Network Licensing fee and remit that to NAN. The creditor/client is fully informed of the amount of the NAN licensing fee and the practice of the law firm withholding and remitting it. In fact they prefer not to have the accounting responsibility for the NAN fee. Some credit grantors may even erroneously misstate the terms of our engagement by referring to our authorization to retain 'an attorney's fee of 28%'. Their intent, however, is for us to retain an attorney fee of 25% and also cover the cost of the 3% NAN license fee as well. Their engagement letter would require our firm to pay all charges (the three percent due the National Attorney Network) for the collection of accounts using that system. Our firm also would negotiate its contingency fee with a credit grantor with full knowledge that payment of the NAN licensing fee would be part of our expense or overhead.

A copy of the National Attorney Network Agreement is enclosed for your review. The pertinent parts have been highlighted in yellow.

Also enclosed for your review is a copy of the letter from the general counsel for the National Attorney Network. This letter contains their opinion regarding the ethical compliance. Please advise if we can continue participating in the National Attorney Network.

We have also retained in our possession certain monies representing the three percent fee while this ethical question can be considered. Your direct instructions regarding permission to remit those funds being held to the National Attorney Network is necessary as well."

ANSWER:

Our review of the agreement you have with National Attorney Network, Inc., leads us to conclude that there is nothing ethically impermissible about it. You are not splitting legal fees with a non-lawyer entity, nor are you participating in a prohibited for-profit referral service by paying for referrals in any way.

In light of this, you may continue to participate in the network and you may ethically remit to National Attorney Network, Inc., monies owed for software licensing fees to date.

MLM/vf

1/3/97

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Opinion Number: 1996-07

Alabama Rules of Professional conduct apply to lawyer advertising on the Internet and private on-liner services

QUESTION:

Do the Alabama Rules of Professional Conduct apply to lawyer advertising on the Internet or private on-line services?

ANSWER:

The number of options available for disseminating lawyer advertising has grown rapidly and will continue to grow over time. However, the advertising and solicitation rules found within the Rules of Professional Conduct focus on content of advertising and not on the means used to advertise. It is the Disciplinary Commission's opinion that any information made available to the public about a lawyer or a lawyer's services on the Internet or private on-line services is subject to regulation under the rules on advertising and solicitation. It makes no difference whether it is done through a web page, a bulletin board, or via unsolicited electronic mail. Any advertising or promotional activity transmitted through the use of a computer is subject to regulation like any other form of lawyer advertising.

Opinion Number: 1996-05

Direct mail advertising

QUESTION ONE: Rule 7.3(b)(2)(v) of the Rules of Professional Conductrequires a lawyer who is sending out a direct mail letter to a prospective client to put the word "Advertisement" in 14-point red ink in the lower left hand corner of the envelope. If this aspect of the rule is complied with, is it permissible to put other words or terms on the envelope as well?

QUESTION TWO: Rule 7.3(b)(2)(i) requires a lawyer to send to the General Counsel's Office a list of names and addresses of those persons to whom a direct mail solicitation letter has been sent. Can this requirement be satisfied by sending in a computer disk on which that information is contained?

ANSWER QUESTION ONE:According to the Comment of new Rule 7.3, the purpose of requiring the word "Advertisement" on the envelope of a direct mail solicitation letter is to avoid the perception that the letter must be opened merely because it is from a lawyer, when it only contains a solicitation for legal business. It is the Commission's opinion that the addition of other words or terms on the envelope are nothing but attempts to subvert the recipient's option of disregarding a legal advertisement. Direct mail envelopes that contain extraneous terms are not permissible and would be in violation of Rule 7.3(b)(2)(v) of the Rules of Professional Conduct.

ANSWER QUESTION TWO:The submission of computer disks containing the names and addresses of persons to whom direct mail letters have been sent does not comply with the filing requirement of Rule 7.3(b)(2)(i). The Commission interprets the term "list" as used in this rule to mean a written or printed series of names. The acceptance of computer disks creates storage problems, and more importantly, the risk of infecting the State Bar's computer system with a virus. The only way to access the information from a disk is to run it on a computer. The information on a printed list is immediately self-evident.

MLM/vf 8/20/96

Opinion Number: 1994-12

Lawyer's communicating on letterhead and business cards fact that he has been certified as an arbitrator by the American Arbitration Association does not violate Rules 7.1 and 7.7

QUESTION:

Is it a violation of Rules 7.1 and 7.7 of the Rules of Professional Conduct for a lawyer to communicate on the lawyer's letterhead, business cards, or advertisement that the lawyer is certified by the American Arbitration Association as an arbitrator? ANSWER:

It is not false and misleading and, thus, not a violation of Rules 7.1 and 7.7 for a lawyer to communicate the fact that the lawyer has been certified as an arbitrator by the American Arbitration Association.

DISCUSSION:

Rule 7.1(d) of the Rules of Professional Conduct provides as follows:

"Rule 7.1 Communications Conceming a Lawyer's Services

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: * * *

(d) Communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.7."

Rule 7.7 provides that a lawyer may not communicate that he or she has been certified by a certifying organization unless that organization has been approved by the Alabama State Bar Board of Legal Specialization. This Rule contemplates legal specialties that are within the practice of law. It does not contemplate other disciplines outside the practice of law, such as accounting, medicine, engineering, financial planning, etc. The Disciplinary Commission, on a number of occasions, has held that a lawyer may communicate non-legal disdplines on the lawyer's letterhead, business cards, or in the lawyer's advertising (see RO-87-80-lawyer/engineer and RO-91-12-lawyer/financial planner).

Since an arbitrator does not necessarily have to be a lawyer, it is the view of the Disciplinary Commission that an arbitrator should be characterized as a non-lawyer discipline and, thus, such designation may be placed on a lawyer's letterhead, business card, or in advertising without the lawyer being certified pursuant to Rule 7.7.

RWN/vf

9/30/94

Opinion Number: 1993-23

Law firm may not establish a separate and distinct law firm and pay for advertising and other operating expenses in return for the referral of cases from said firm (Modified by RO-99-01)

QUESTION:

"Our firm desires to fund the costs of establishing a separate firm, paying rent, utilities, incidental expenses and salaries for one or more attorneys and their secretaries. The lawyers comprising the separate firm would not be partners or associates of our firm. In the event the separate firm desired to advertise then we would underwrite all costs and expenses relating to television and radio advertising of the services of the separate firm.

It is anticipated the lawyers comprising the separate firm will refer to our firm certain cases generated by their firm which our firm desired to handle. Our firm will handle those cases it desires and may decline those it does not wish to handle.

All cases which our firm decides to handle will be under a contingency fee arrangement, with the separate firm receiving any referral fee earned.

May we fund the establishment of the separate firm and pay for its advertising, under agreement that certain cases generated by that firm may be referred to our firm for an acceptance or rejection as above described?" ANSWER:

Your law firm may not establish a separate and distinct law firm and pay for advertising and other operating expenses in return for the referral of certain cases.

DISCUSSION:

This same question was previously considered by the Disciplinary Commission in RO-92-23 which is attached hereto. In that opinion, the Disciplinary Commission felt that this type of arrangement would violate Rule 7.1 of the Rules of Professional Conduct because the public could be misled about who would actually be representing them. You have not specified who is going to control the content of any advertising, and who will decide which cases are to be referred to your firm. It sounds as though you intend to screen all of the separate firm's cases.

Other Rules of Professional Conduct are potentially impacted by your proposal. Since your firm is going to pay salaries and operating expenses of these unassociated lawyers, you are giving something of value in return for a referral or recommendation of your services. This is violative of Rule 7.2(c).

While you have made a point of identifying this new firm established by you as "separate", it is apparent that your only purpose in proceeding as stated is to create an advertising front and referral conduit for your existing firm. Rule 1.10 deals with vicarious disqualification of lawyers associated in a "firm". Whether a group of lawyers constitutes a firm for purposes of this rule is a factual question. The Comment to Rule 1.10 notes that a group of lawyers could be considered a "firm" in one context of the rule, but not in another. If lawyers are associated in the practice of law in some way, the exact relationship can be immaterial for purposes of Rule 1.10. In that regard, it is the Commission's opinion that this "separate" firm would inherit all the conflicts relevant to your firm's former and existing clients. Your firm would, of course, be reciprocally affected by Rule 1.10.

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415 Dexter Avenue • Montgomery, Alabama 36104 • (334) 269-1515 • Fax (334) 261-6310 • (800) 354-6154

Opinion Number: 1993-11

Use of the terms "Associates", "Law Firm", and "Law Offices" in law firm name

QUESTION:

"Assuming that an attorney is a sole practitioner, which of the following forms of name may he ethically use for his practice:

John Doe & Associates John Doe Law Firm John Doe Law Office

Similarly, if the attorney has one associate (employed lawyer), which of those names may he use?

The first of these names (John Doe & Associates) was approved for a firm with an undisclosed number of associates in RO-87-01. It is unclear from that opinion and Rule 7.1(a) whether the use of the term 'associates' means that the lawyer must have at least one associate, or at least two associates in order not to be 'misleading.'

Similarly, many solo practitioners use the 'John Doe Law Office' or 'Law Offices of John Doe' appellation. Does the term 'John Doe Law Firm' carry enough of a different connotation that 'Firm' would be misleading for a solo practitioner, while 'Office' would be allowable?"

ANSWER:

An attorney may designate his practice by the name "John Doe & Associates" only if he has at least one associated attorney in his employ. A sole practitioner may use the term "John Doe Law Firm," "John Doe Law Office," or "Law Offices of John Doe."

DISCUSSION:

Firm names and letterhead are governed by the provisions of Rule 7.5 read in conjunction with Rule 7.1 of the Rules of Professional Conduct of the Alabama State Bar. In substance, these rules provide that a firm name or letterhead shall not be misleading to the public. The Disciplinary Commission is of the opinion that the firm name, "John Doe & Associates" would lead the public to believe that John Doe has at least one other attorney associated with him in the practice of law. However, if the attorney has only one associate, the Disciplinary Commission is of the opinion that it is not necessary to restrict the name to the singular in order to avoid misleading the public. Whether a lawyer who does not presently employ other lawyers can claim that he normally employs one or more associates depends upon how long the firm has been without one or more associate attorneys and the firm's efforts to engage more associates.

The Disciplinary Commission is further of the opinion that the names "John Doe Law Firm" and "John Doe Law Office" may be used by a sole practitioner without misleading the public as to the size of the firm or the number of attorneys employed. [1993-11]

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Opinion Number: 1992-23

Law firm's paying of advertising budget of solo practitioner who refers cases to law firm discussed (Modified by RO-99-01)

QUESTION:

"Our firm is desirous of funding the television advertising, and perhaps radio advertising, for a solo practitioner here in the Anytown area. We expect to have a telephone line installed at the solo practitioner's office to be used exclusively for responses to the advertising. When calls come in, information pertaining to the caller's potential case is taken down and, assuming the claim has merit, the caller is informed up front that he or she will be contacted by another attorney who specializes in the problem related by the caller. Someone in our firm will contact the caller and discuss the potential case over the phone and, if appropriate, either inform the caller that the firm is declining to represent him or her or schedule an appointment with the caller at which time an employment contract would be executed between our firm and the caller assuming our firm decides to take the case.

It is anticipated and expected that the solo practitioner will retain many of these cases himself. The solo practitioner has been in private practice in the state for approximately ten years, and has extensive litigation experience in state and federal court.

All cases which our firm decides to handle will be done on a contingency fee basis, and the solo practitioner will receive a referral fee."

ANSWER: Your firm may fund the television advertising for a solo practitioner who will in turn refer cases to your firm, if such a concept does not cause to be made a false or misleading communication about the lawyers' services available to the public, and, the requirements of those Rules of Professional Conduct relative to advertising are met.

DISCUSSION: Rule 7.1, Alabama Rules of Professional Conduct, states as follows:

"Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; (c) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or (d) communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.4."

The main concern in your proposed scheme would be to make sure that anyone who calls the listed number in the advertisement not be misled as to who they are dealing with and who will be representing them in their particular legal matter. While the referral concept is obviously an acceptable one in this State, the advertising of such a conduit whereby your firm avoids direct participation in the advertising other than funding same should not be so structured as to mislead any member of the public as to what attorney or attorneys they will be dealing with and possibly having as their legal representative.

Further, the lawyers involved in such a cooperative venture should make sure the client is aware of the referral system, division of fees, degree of participation of attorneys involved, etc., as mandated by Rule 1.5, Alabama Rules of Professional Conduct.

The purpose of the rules is to protect the public. Any advertising scheme which would circumvent full disclosure of relevant information to the consuming public when advertising legal services violates not only the rules themselves, but their purpose as well.

Strict adherence to the applicable rules would allow a plan such as that proposed by you. However, safeguards should be installed in such a system so as to prevent any misleading of the public while maintaining the integrity of the representation of the client.

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Opinion Number: 1990-100

Lawyer or law firm operating under trade name must include trade name in all other permissible communications made pursuant to Rule 7, A.R.P.C.

QUESTION:

Must a lawyer or law firm operating under a trade name, such as "AAA Legal Clinic", include that trade name in all permissible communications made pursuant to Canon 2 of the Code of Professional Responsibility or Rule 7 of the Rules of Professional Conduct?

ANSWER:

Rule 7.5(a) of the Rules of Professional Conduct states in pertinent part as follows, to-wit:

"Rule 7.5 * * * (a) A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4."

Rule 7.1 says in pertinent part as follows, to-wit:

"Rule 7.1 * * *

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communi- cation is false or misleading if it:

(a) contains a material misrepre- sentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; ..." Lawyers are permitted to advertise and to communicate with the public regarding legal services in a variety of ways including, but not limited to, public media such as a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, mailed circulars, brochures or "Shapero letters". In addition lawyers may, and by tradition do, utilize business cards and letterhead/legal stationary as a means of communicating with the public. With recent amendments to the ethical rules governing lawyer advertising it has become permissible for Alabama lawyers to render legal services under a "trade name", so long as the name of one or more lawyers responsible for the content of the communication relating to those services is a part of, or accompanies, the use of a trade name. Accordingly, the aforenamed (mythical) "AAA Legal Clinic" is permissible, so long as any communications regarding services rendered by "AAA", such as permissible advertisements, letterheads or business cards (all being communications permitted pursuant to the rules), include not only the name "AAA Legal Clinic" but also the name of a lawyer responsible for the content of the communication. In the context of "AAA Legal Clinic" such a communication might state "AAA Legal Clinic, John Doe, Attorney". Such a listing is not the only form permissible, but is merely illustrative of the connection between trade name and attorney name required by the rules.

The Commission must also consider whether an attorney, operating under a trade name, should continue use of that trade name in connection with all permissible communications made pursuant to the rules. In our opinion it is both reasonable and proper for an attorney, operating under a trade name, to continue to utilize that trade name in all permissible communications including letterhead and business card communications, and also in legal advertising permitted by the rules. The purpose of all bar regulation of attorney advertising content is to protect the public and to insure that information about legal services, and communications made by lawyers about services, are truthful, non-deceptive and informative. The rules directly address missrepresentations made by both commission and omission [Rule 7.1(a)]. In our opinion for an attorney to practice under a trade name and to hold himself out under a trade name in one instance, and then to abandon that trade name when it suits his convenience, creates an omission that falls below the standard mandated by Rule 7.1. Accordingly, not only must an attorney, practicing under a trade name, include in all permissible communications the name of a lawyer responsible for the content of the communication, but it is our opinion that this rule also requires that the connection between lawyer and trade name be consistent and uniform such that the connection become inseparable and a part of all public communication made on behalf of either. A lawyer using a trade name has made an election and has hereby determined how he must be identified in public communications. His trade name has become his firm name, by choice, and his use of this trade name precludes the use of any other firm name or trade name in permissible public communications. John Doe, of the mythical "AAA Legal Clinic" cannot have an alternate identity as a partner in "Doe, Roe and Moe, Attorneys", unless the usage is "Doe, Roe and Moe, Attorneys, d/b/a AAA Legal Clinic". The use of the trade name, together with the name of the lawyer, in pleadings and the like is a matter beyond the scope of this opinion but it is nonetheless our opinion that, unless otherwise precluded by court rule, the use of the trade name should be carried forward into such pleadings and into all permissible communications regarding the same. A further effect of this opinion will be that lawyers or law firms that have adopted trade names selected or designed to provide an alphabetical advantage in "Yellow Page" directory listings will have to be consistent in the use of that trade name in all permissible communications. To allow the use of a trade name in one context, while to permit its

omission in all other respects, would be to make a sham of the rule and would permit misleading communications, either by the use of the trade name in one context or by its omission in another. Consistency and uniformity are the only remedy and it is thus our opinion that a trade name, once adopted, and once used in connection with communications with the public pursuant to Rule 7, must be used in all contexts and in all permissible public communications. Application of this standard will insure that the Bench, the Bar and the public will be afforded complete and accurate information regarding the lawyer or law firm offering legal services, and that everyone will know with what lawyer and what entity they are dealing.

AWJ/vf

12/20/90

Opinion Number: 1990-01

Business cards of paralegal must contain identification of the non-lawyer employee as "non-lawyer assistant."

QUESTION:

"My secretary has recently been certified as a Professional Legal Secretary. This certification is issued by the National Association of Legal Secretaries to those professionals who pass an extensive two day examination which is given twice each year. This is the only national certification available in this area of the field of law.

The purpose of this letter is to inquire if there would be any violation of the Code of ethics if my secretary had business cards with her name followed by the initials PLS (Professional Legal Secretary) and my office address showing thereon.

In my research of the Code of Ethics, I find that there would be no violation, however, I would appreciate you looking into this formally and providing me with a response."

ANSWER:

Temporary Disciplinary Rule 2-106 provides as follows:

"DR 2-106

A professional card of a non-lawyer employee of a lawyer or law firm must contain the identification of the non-lawyer employee as 'Non-Lawyer Assistant.' Such cards may be used for identification, subject to Temporary DR 2-103."

While the Code of Professional Responsibility does provide a mechanism whereby organizations that certify lawyers may be approved, no such mechanism is in place for organizations that certify non-lawyers. Nonetheless, it is our opinion that the designation "Professional Legal Secretary" as certified by the National Association of Legal Secretaries may be listed by your secretary on her otherwise permissible business card, which contains her name, followed by the initials PLS, and which also contains your office address. We would opine further, however, that the card must also include the mandatory language of Temporary Disciplinary Rule 2-106 as set forth hereinabove.

AWJ/vf 1/17/90

FREQUENTLY PROVIDED ADVERTISING ADVICE:

1. Do I need the disclaimer? Yes, if you communicate an area of practice. If not, no.

2. I'm setting up my firm website/re-doing my firm's website? Any advice? Yes. I advise that somewhere on your page you should advise visitors that no attorney-client relationship is established by visiting the website or sending an email and that nothing the visitor sends is privileged until a formalized attorney-client relationship is established.

3. What is the "extended testimonial disclaimer" and do I need it? The extended testimonial disclaimer is found in the answer to question #10 in OGC Opinion 2003-01 titled "Various Advertising Issues Addressed." Basically, you need the extended testimonial disclaimer if you talk about verdicts or settlements or use client testimonials.

4. Will you approve my advertisement? No. The office of General counsel does not "approve" advertising. However, if you email me your advertisement I will review it for compliance with Rules 7.1-7.6. If it is not compliant, I will explain what you can do to bring the advertisement into compliance with the advertising rules.

5. Once reviewed for compliance, can I email my advertising proof/video/radio ad/solicitation letter? No. Due to the incredibly high volume of advertising submitted to OGC, it would be cost prohibitive to print all submitted advertising or even a fraction of it. As a result, OGC requires all finalized advertisements be submitted in hard copy form.

6. I want to send a solicitation letter. That rule is really complicated. Can you help me. Yes? High points:

   a. Comply with timing requirements of 7.3(b)(1), Ala. R. Prof. C.

B. MOST REGULARLY VIOLATED SUB-PARTS OF 7.3:

I. SAMPLE COPY TO BAR-7.3(B)(2)(I)

II. "ADVERTISEMENT" IS NOT STAMPED ON RED 14 POINT FONT ON BOTH THE LETTER AND THE ENVELOPE-7.3(B)(2)(V)

III. THE FIRST SENTENCE IS NOT "IF YOU HAVE ALREADY HIRED AN ATTORNEY IN CONNECTION WITH THIS MATTER PLEASE DISREGARD THIS LETTER." 7.3(B)(2)(VI)

IV. IF THE COMMUNICATION IS PROMPTED BY A SPECIFIC OCCURRENCE THE COMMUNICATION SHALL DISCLOSE HOW THE ATTORNEY OBTAINED THE INFORMATION PROMPTING THE COMMUNICATION. 7.3(B)(2)(VIII)-***THIS IS THE MOST VIOLATED SUB-PART OF RULE 7.3***

7. DOES MY FACEBOOK/TWITTER/BLOG/INSTAGRAM/YOUTUBE PAGE NEED THE DISCLAIMER? YES. IF YOU TALK ABOUT VERDICTS, SETTLEMENTS, OR PROVIDE CLIENT TESTIMONIALS YOU NEED THE EXTENDED TESTIMONIAL DISCLAIMER. SEE #3 ABOVE.

8. I SAW AN ADVERTISEMENT FOR [INSERT ATTORNEY NAME HERE] AND IT WAS MISSING THE DISCLAIMER. IS THAT A VIOLATION? I AM PROHIBITED FROM COMMENTING ON THE CONDUCT OF ANOTHER ATTORNEY.

9. MAY I HAVE A BOOTH AT A TRADE SHOW? YES, BUT YOU MAY NOT MAN THE BOOTH AND YOU MAY ONLY HAVE ONE DOCUMENT PROVIDING INFORMATION ABOUT YOUR FIRM'S SERVICES. YES, A POSTERBOARD IS PERMISSIBLE.

10. MAY I PLACE A FLYER IN A BUSINESS? YOU MAY LEAVE A SINGLE FLYER OR BUSINESS CARD IN ANOTHER BUSINESS IF AND ONLY IF THERE IS A BULLETIN BOARD OF SOME SORT LOCATED IN THE BUSINESS THAT IS AVAILABLE TO PLACE BUSINESS CARDS/FLYERS OF OTHER BUSINESSES. YOU MAY NOT LEAVE A STACK OF BUSINESS CARDS ANYWHERE OR PROVIDE STACKS OF BUSINESS CARDS TO CLIENTS TO GIVE TO THEIR FRIENDS. RULE 7.3, ALA. R. PROF. C., FORBIDS AGENTS OF YOUR FIRM FROM SOLICITING BUSINESS FOR YOU.

ADVERTISING COOPERATIVE v. LEAD GENERATION SERVICE:

WHAT IS THE RULE?

ANSWER:

PURSUANT TO ALABAMA STATE BAR v. R.W. LYNCH, 655 So. 2d 982 (1995), A TRUE ADVERTISING COOPERATIVE IS PERMISSIBLE BUT A PAY-PER-LEAD GENERATION SERVICE IS NOT.

C

Supreme Court of Alabama.
ALABAMA STATE BAR ASSOCIATION
v.
R.W. LYNCH COMPANY, INC., and Robert H. Ford.

1931408.
Feb. 10, 1995.

Attorney and advertising agency filed declaratory judgment action to determine whether television advertisement violated rule of professional conduct governing advertising. The Circuit Court, Montgomery County, No. CV-93-1218,Randall Thomas, J., entered judgment declaring that advertisement did not violate rule. State Bar Association appealed. The Supreme Court, Ingram, J., held that: (1) plaintiffs were interested parties in determination of whether advertisement violated rule and so were entitled to bring declaratory judgment action regarding matter, and (2) advertisement was form of group advertising, rather than referral service.

Affirmed.

Houston, J., filed special concurring opinion.

Maddox, J., filed dissenting opinion.

West Headnotes

[1] Declaratory Judgment 118A ⇐204

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak204 k. State Officers and Boards. Most Cited Cases

Interested party may file declaratory judgment action for interpretation of Bar rule.

[2] Declaratory Judgment 118A ⇐300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases

Attorney who advertised on television answering service and advertising agency that operated service were interested parties in determination of whether advertisement violated rule of professional conduct and so were entitled to bring declaratory judgment action regarding matter. Rules of Prof.Conduct, Rule 7.2(c).

[3] Attorney and Client 45 ⇐32(9)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(9) k. Advertising or Soliciting. Most Cited Cases

Television advertisement for attorney answering service was form of group advertising permissible under Rules of Professional Conduct, rather than impermissible referral service; commercial expressly informed its viewers that it was paid advertisement for listed attorneys, calls were not screened by answering service, callers' potential legal needs were not evaluated by service, caller was forwarded to attorney only on basis of geographical area in which caller lived, and attorneys paid flat rate fee regardless of number or type of calls service forwarded to them. Rules of Prof.Conduct, Rule 7.2(c)

*982 J. Anthony McLain, Asst. Gen. Counsel, Alabama State Bar, Montgomery, for appellant.

Robert D. Segall and E. Terry Brown of Copeland, Franco, Screws & Gill, P.A., Montgomery, for appellees.

INGRAM, Justice.

655 So.2d 982
(Cite as: 655 So.2d 982)

R.W. Lynch Company, Inc. ("Lynch"), and Robert H. Ford, an Alabama attorney, filed a declaratory judgment action in the Montgomery Circuit Court to determine whether a television advertisement, created by Lynch, violated Rule 7.2(c) of the Alabama Rules of Professional Conduct. The disciplinary commission of the Alabama State Bar Association ("the Bar") had previously issued an ethics opinion concluding that an earlier version of the advertisement violated Rule 7.2(c). The Bar appeals from the trial court's judgment *983 declaring that the advertisement did not violate Rule 7.2(c).

Rule 7.2, Alabama Rules of Professional Conduct, provides:

"Rule. 7.2 Advertising

"A lawyer who advertises concerning legal services shall comply with the following:

"....

"(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service."

The pertinent portion of the comment to Rule 7.2 states:

"A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs."

Lynch, a California advertising agency specializing in attorney advertising, produces an "Injury Helpline" television marketing program currently in use in several states. Several law firms or sole-practitioner attorneys may jointly purchase advertising from Lynch on the "Injury Helpline" commercial. The commercial, directed at individuals with personal injury claims, lasts approximately 30 seconds. The commercial expressly states: "Advertising paid by sponsoring attorneys. Not a lawyer referral service." The attorneys' or firms' names and addresses appear on the commercial, and a 1-800 toll-free telephone number is provided for the viewer to call. The calls are received by an answering service. The caller is asked for only his or her name, telephone number, and Zip Code; the answering service obtains no further information concerning the caller's situation. The caller's information is then forwarded by Lynch to the attorney or firm that has contracted for the advertising rights to that caller's geographical area, determined by the caller's Zip Code. The attorney then contacts the caller to schedule an appointment. Lynch is responsible for placing the commercials and for maintaining the answering service for the participating attorneys.

In 1989, the Bar reviewed a similar "Injury Helpline" commercial produced by Lynch and ruled that it was impermissible under Temporary Rule DR-2-102 (the predecessor to the current Rule 7.2) because, the Bar stated, Lynch's program was a "for-profit referral service." In 1992 Lynch asked the Bar to again review the "Injury Helpline" advertisement, after making minor changes in its format; the Bar refused, and Lynch and Ford filed this declaratory judgment action.

After reviewing the evidence, the trial court, in a detailed, written order, stated, in pertinent part:

"The only issue before this Court ... is whether the 'Injury Helpline' is permissible group advertising or whether, as the Bar contends, it is an impermissible 'for-profit' lawyer referral service. The Bar has offered to the Court only one rationale for its position. According to the Bar, the mere use of an answering service, over which the Bar has no jurisdiction, makes the 'Injury Helpline' a lawyer

referral service rather than permissible group advertising.

"Although this Court understands that lawyer advertising can, under some circumstances, be distasteful and fraught with dangers and can even demean the term 'professional,' no such allegations or contentions are made by the Bar in this case with respect to the 'Injury Helpline.' Moreover, this Court is wholly unable on the basis of the use the 'Injury Helpline' makes of an answering service, to characterize the 'Injury Helpline' as a lawyer referral service. On the contrary, all of the evidence in this case shows clearly that the 'Injury Helpline' is not a lawyer referral service, but rather is a permissible ***984** group advertising program. The fact that the Bar has no jurisdiction of an out-of-state answering service in no way changes this result. The Bar has no jurisdiction over many entities with whom lawyers contract....

"....

"The 'Injury Helpline' is permissible group advertising that does not in any way violate Rule 7.2 of the Alabama Rules of Professional Conduct."

[1][2] To begin our discussion, we note that the Bar asserts that the trial court had no jurisdiction to interpret the Alabama Rules of Professional Conduct. We disagree. By remedial writ the Montgomery Circuit Court can review matters concerning the Bar. See *Simpson v. Alabama State Bar*, 294 Ala. 52, 311 So.2d 307 (1975) (attorney requested a writ of prohibition from the Montgomery Circuit Court to halt Bar disciplinary proceedings). An interested party may file a declaratory judgment action for an interpretation of a Bar rule. See *Board of Comm'rs, Alabama State Bar v. State ex rel. Baxley*, 295 Ala. 100, 324 So.2d 256 (1975) (attorney general filed an action in the Montgomery Circuit Court seeking, in part, a judgment declaring that a Bar rule was unconstitutional). Under the circumstances of this case, we hold that Lynch and Ford could properly request a review of the Bar's action through a declaratory judgment proceeding; the trial court's judgment is appropriately before this Court for review.

The Bar next argues that the "Injury Helpline" is a "for-profit referral service," prohibited by Rule 7.2.

[3] We have reviewed the sample commercial as created by Lynch and as viewed by the trial court, and we find it unobjectionable under Rule 7.2. We hold that the "Injury Helpline" is not a referral service; rather, it is a form of group advertising permissible under the Rules of Professional Conduct. A 1989 report drafted by the American Bar Association Standing Committee on Lawyer Referral and Information Service stated the following in regard to lawyer referral services:

"Lawyer referral programs offer two important services to the public. First, they help the client determine if a problem is truly of a legal nature by screening inquiries, and referring the client to other service agencies when appropriate.

"The second and perhaps more important function of a lawyer referral service is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's need....

"....

"... [The lawyer referral service] is expected to be able to match the consumer's particular legal, economic, geographic, language, and other needs with an attorney who is competent to handle the matter referred or [refer the consumer] to another agency or organization if that is in the best interest of the client."

Comparing the "Injury Helpline" commercial with the functions and services referred to in the A.B.A. report makes it clear that the "Injury Helpline" is a form of group advertising rather than a lawyer referral service. The commercial expressly informs its viewers that it is a paid advertisement for the listed attorneys. The calls are not screened

by Lynch's answering service. In no manner are the callers' potential legal needs evaluated by Lynch. No representation is made to the caller regarding an attorney's experience or skill. As noted above, a caller is forwarded to an attorney only on the basis of the geographical area in which the caller lives: the attorney is contractually required to provide a consultation to any person responding to the 1-800 number who resides in the attorney's geographical area. The attorneys who pay for the "Injury Helpline" advertisement are the only persons who speak with the callers concerning the callers' legal situations. The attorneys who participate in Lynch's program pay a flat-rate fee for the advertising, unrelated to the number of calls or type of calls that Lynch forwards to them. The "Injury Helpline" is merely an economical group advertising method that allows individual attorneys and law firms to pool their resources to achieve greater advertising exposure.

*985 The judgment of the trial court is affirmed.

AFFIRMED.

ALMON, SHORES and COOK, JJ., concur.
HOUSTON, J., concurs specially.
MADDOX, J., dissents.

HOUSTON, Justice (concurring specially).

I firmly believe that it is not in a client's best interest to select a lawyer during a station break; however, whether I think lawyer advertising should be protected as commercial speech is irrelevant. The United States Supreme Court, a higher authority than I, has held that blanket prohibitions against lawyer advertising unconstitutionally infringe on the First Amendment right to express commercial speech. *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). The supremacy clause of the Constitution of the United States requires that I be bound by the Supreme Court's holding in *Bates.* If the advertising is inaccurate or concerns unlawful activity, it may be banned outright. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The State Bar does not contend that the "Injury Helpline" ad is inaccurate or unlawful; I have seen this television ad several times, and I have found nothing unlawful or inaccurate about it. Even if the ad is not inaccurate or unlawful, a state may still restrict the ad if the state has a substantial interest to be protected by the restriction, if the restriction directly advances the state interest, and if the restriction is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp.,* supra. I do not believe the State Bar has advanced any substantial state interest to justify applying the restriction of Rule 7.2(c), Alabama Rules of Professional Conduct, to the "Injury Helpline." That is the State Bar's burden:

"It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.' *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71, n. 20, 103 S.Ct. 2875, 2883, n. 20, 77 L.Ed.2d 469 (1983); [*Board of Trustees of State Univ. of New York v.*] *Fox,* 492 U.S. [469], 480, 109 S.Ct. [3028], 3035[, 106 L.Ed.2d 388 (1989)]. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. See, e.g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 648-49, 105 S.Ct. 2265, 2281, 85 L.Ed.2d 652 (1985). Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."

Edenfield v. Fane, 507 U.S. 761, ----, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993) (some citations omitted).

MADDOX, Justice (dissenting).

I recognize that the majority's opinion here is probably consistent with the law relating to attorney advertising, as declared by the Supreme Court

of the United States in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and in subsequent cases. However, the lawyer-advertising landscape has radically changed since *Bates* was decided, and I note that the United States Supreme Court has recently granted certiorari review in the case of *The Florida Bar v. McHenry*, 512 U.S. 1289, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994), in which the Florida Bar is asking the Supreme Court to give it greater latitude in regulating lawyer advertising.

I believe that the United States Supreme Court, in the Florida case, intends to reexamine the issue of acceptable guidelines for attorneys who wish to advertise and that it may modify the law relating to what a State Bar can and cannot do in regulating lawyer advertising. I would not decide this case until the Florida case has been decided by the United States Supreme Court; consequently, I must disagree with the Court's decision to release the case.

Ala.,1995.
Alabama State Bar Ass'n v. R.W. Lynch Co., Inc.
655 So.2d 982

END OF DOCUMENT

ATTORNEY ADVERTISING VIA SOCIAL MEDIA:

A HOT TOPIC IN PROFESSIONAL RESPONSIBILITY/LEGAL ETHICS JOURNALS

(ALL TAKEN FROM SPRING/SUMMER 2013)

Walton v. Mid-Atl. Spine Specialists P.C., 694 S.E.2d 545 (Va. 2010).

Waiver through the unreasonable although mistaken release of documents is widely recognized, although not universal. See *Jackson v. Greger*, 854 N.E.2d 487 22 Law. Man. Prof. Conduct 524 (Ohio 2006) (holding that Ohio's privilege statute leaves no room for judicially created waiver test).

Full text at http://www.vacle.org/opinions/1871.htm.

Advertising and Solicitation

Lawyers, but Not Law Firms, May List Their 'Specialties' in Social Media Profile

A law firm may not describe its services under a section on LinkedIn devoted to "Specialties," but an individual lawyer may do so if she has been appropriately certified and complies with the disclaimer requirements that apply to communications about practice area specialization, the New York State bar's ethics committee concluded June 26 (New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 972, 6/26/13).

Although lawyers and law firms may publicly identify practice areas in which they concentrate, New York Rule of Professional Conduct 7.4(c) specifies that only individual lawyers may state that they have been "certified as a specialist in a particular area of the law" by a private organization authorized to grant such recognition.

"Rule 7.4(c) does not provide that a law firm (as opposed to an individual lawyer) may claim recognition or certification as a specialist," the committee explained, "and Rule 7.4(a) would therefore prohibit such a claim by a firm."

The committee pointed out that a lawyer who does make such a claim on a social media profile must "comply with [Rule 7.4(c)'s] disclaimer provisions, which have undergone recent changes."

Tell Me About Yourself. The committee's guidance responds to an inquiry from a law firm that created a LinkedIn profile and was prompted to fill in an "About" segment on the page that "include[s] a section labeled 'Specialties.' "

"The firm can put items under that label but cannot change the label itself," the opinion states. "However, the firm can, in the 'About' segment, include other sections entitled 'Skills and Expertise,' 'Overview,' 'Industry,' and 'Products and Services.' "

The law firm asked whether it could use the "Specialties" section to describe the kinds of services it provides.

The panel concluded that the firm may not do so.

Problematic Heading. In reaching that determination, the committee focused on the heading that LinkedIn chose to provide users for use in describing their professional services.

"A lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice," the committee acknowledged. "But to list those areas under a heading of 'Specialties,' would constitute a claim that the lawyer or law firm 'is a specialist or specializes in a particular field of law,' " the committee observed.

Law firms are prohibited from making such a claim, the committee pointed out. The panel quoted Rule 7.4(a) in full and highlighted relevant language supporting its conclusion:

> A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm *shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law*, except as provided in Rule 7.4(c).

Unlike firms, individual lawyers may make specialization claims, the committee said, pointing to the exception identified in Rule 7.4(a). That exception, set forth in Rule 7.4(c), provides that such claims by lawyers are permissible if:

- the certifying organization has "been approved for that purpose by the American Bar Association," and the lawyer "prominently" displays a disclaimer stating that the organization in question is "not affiliated with any governmental authority"; and
- the lawyer "prominently" displays a disclaimer that certifications granted by organizations in other jurisdictions are "not recognized by any governmental authority within the State of New York."

Disclaimer Issue in Flux. The committee noted that the task of complying with the disclaimer requirements in Rule 7.4(c) has been complicated by the recent decision in *Hayes v. Grievance Comm. of Eighth Judicial Dist.*, 672 F.3d 158, 28 Law. Man. Prof. Conduct 141 (2d Cir. 2012). In that case, the Second Circuit held that two parts of the rule's mandated disclaimers were unconstitutional infringements on lawyers' rights to engage in commercial speech.

The 'LinkedIn Loophole'

In a February 2013 notice to its members, the South Carolina bar highlighted a problematic feature on LinkedIn that allows members of the public to add endorsements of a lawyer's "expertise" to the lawyer's online profile.

The endorser's comments then appear on "an as-yet unremovable section on each lawyer's page" entitled "Skills & Expertise," the notice said. This placement creates a Rule 7.4 problem even though it was a third party, and not the lawyer, who added the offending language, the bar concluded.

The bar group directed lawyers to a temporary fix: instructions on how to hide third-party endorsements on a LinkedIn profile.

The court's first objection related to language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

The Appellate Divisions responded to that ruling by deleting the offending language, the committee noted.

However, the second part of the *Hayes* court's ruling—which involved a "void for vagueness" chal-

ents," the committee observed. Accordingly, it explained,

> Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure. There is also no duty to correct erroneous assumptions of opposing counsel.

(Citations omitted.)

Disciplinary consequences would be warranted, the panel said, if the seller's attorney committed an "act of moral turpitude, dishonesty, or corruption" under Section 6106 of the California Business and Professions Code, or if he breached Section 6128(a) by "engag[ing] in deceit or active concealment, or mak[ing] a false statement of material fact to a nonclient."

Potential Civil Liability to Third Parties

In its opinion addressing the rules of professional conduct, the California bar's ethics committee warned that the nondisclosing attorney could be exposed to civil liability as well as disciplinary consequences if he was found to have engaged in fraud or intentional misrepresentation.

It pointed to several cases as supporting that proposition, including *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 131 Cal. Rptr.2d 777, 19 Law. Man. Prof. Conduct 163 (Cal. Ct. App. 2003) (insured's judgment creditors had right to sue coverage counsel for misrepresenting scope of coverage), and *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal. Rptr.3d 26, 20 Law. Man. Prof. Conduct 398 (Cal. Ct. App. 2004) (law firm exposed itself to fraud claim by making "partial" disclosure to buyers of "toxic" stock offer).

Additionally, it said, ethics charges would be justified if the seller's lawyer "knowingly assist[ed] his or her client in any criminal or fraudulent conduct," in violation of California Rule of Professional Conduct 3-210.

No such violations were indicated under either of the two scenarios, the committee stated.

Withdrawal? The committee also noted that Model Rule 1.2(a) would constrain the seller's lawyer in his ability to make a unilateral disclosure of the contract error. That rule states that attorneys generally must follow the instructions of their clients. (The provision has no direct counterpart in the California rules, but the committee noted that ABA standards "may be used for guidance by lawyers where there is no direct California authority and [they] do not conflict with California policy.")

On the other hand, the panel observed that Rule 3-700(B)(2) requires a lawyer to withdraw from a representation if the lawyer "knows or should know that continued employment will result in violation of these rules or of the State Bar Act."

"Such an obligation . . . may arise if the unethical conduct in question involves a fraudulent failure to make a disclosure," the committee added.

The panel pointed to Los Angeles County Ethics Op. 520, 23 Law. Man. Prof. Conduct 460 (2007), which advised that an attorney who detects an inadvertent settlement overpayment may not unilaterally inform his client's adversary but may have to withdraw if his client refuses to rectify the error.

Withdrawal may also be required in the case of the seller's attorney under the second scenario, the opinion states.

The committee explained that the lawyer engaged in no unethical conduct "prior to discovery of the unintentional defect" under that scenario. "But once Seller's Attorney realizes his own error," it added, "we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances."

Accordingly, the committee said, "If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing."

Full text at http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202013-189%20%5B11-0002%5D.pdf.

Trial Conduct

Lawyer Must Disclose Identity and Purpose When Making 'Friend' Requests to Witnesses

Ethics rules do not forbid attorneys' use of social media to investigate a nonparty witness, but a lawyer "may not omit identifying information from a request to access a witness's restricted social media information because doing so may mislead the witness," according to the New Hampshire bar's ethics committee (New Hampshire Bar Ass'n Ethics Comm., Op. 2012-13/5).

The guidance matches advice from at least two other ethics committees that a lawyer engages in unethical subterfuge by asking for access to an unrepresented person's social networking data without disclosing both her identity and the reason for her request.

An omission of this sort "creates an implication that the person making the request is disinterested" and thus amounts to a false statement of material fact under New Hampshire Rule of Professional Conduct 4.1, the committee said. It also constitutes deceitful conduct in violation of Rule 8.4(c), the panel added.

Split of Authority. The Philadelphia and San Diego County bars' ethics committees reached similar conclusions in addressing social media contact with witnesses. See Philadelphia Ethics Op. 2009-2, 25 Law. Man. Prof. Conduct 218 (2009); San Diego County Ethics Op. 2011-2, 27 Law. Man. Prof. Conduct 438 (2011).

But there is "a split of authority on this issue," the New Hampshire panel conceded, pointing to New York City Ethics Op. 2010-2, 26 Law. Man. Prof. Conduct 607 (2010). That opinion found that a lawyer must use "her real name and profile" when sending "friend requests" to unrepresented persons, but further determined that

there is no ethical obligation to affirmatively disclose the reason for such requests.

The New Hampshire panel said it "recognizes the counter-argument that a request in-name-only is not overtly deceptive since it uses the lawyer's or agent's real name and since counsel is not making an explicitly false statement." However, it added, there is support for the proposition that "partially true but misleading statements or omissions . . . are the equivalent of affirmative false statements."

Diligence in Information Age. The committee acknowledged that ethics rules "do not explicitly address" lawyers' interactions with social media. "Nonetheless, the rules offer clear guidance in most situations where a lawyer might use social media to learn information about a witness, to gather evidence, or to have contact with the witness," it added. "The guiding principles for such efforts by counsel are the same as for any other investigation of or contact with a witness."

"First and foremost," the panel said, "the lawyer has a duty under Rules 1.1 and 1.3 to represent the client competently and diligently." Those provisions impose a specific obligation to gather "sufficient facts" about a client's case from "relevant sources," Rule 1.1(c)(1), and to take steps to ensure "proper preparation" under Rule 1.1(b)(4).

Those duties take on increased resonance in criminal defense matters, the committee added, as they "may have a constitutional as well as an ethical dimension."

"In light of these obligations, counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation," the committee advised.

"The duties of competence and diligence are limited, however, by the further duties of truthfulness and fairness when dealing with others," it said.

Why Can't We Be 'Friends'? The committee noted that fact-specific analysis may be required to assess the ethical propriety of an attorney's conduct in using social media as an investigative tool. Accordingly, the opinion is organized in several subparts, each of which addresses a different factual scenario.

Viewing witness's unrestricted accounts. Attorneys may freely access witnesses' online profiles "*if* the pages and accounts are viewable or otherwise open to all members of the same social media site," the committee declared. Although Rule 4.2 generally prohibits direct communications with represented persons, and Rule 4.3 regulates contact with unrepresented persons, "simply viewing a Facebook user's page or 'following' a Twitter user is not a 'communication' with that person," the opinion states.

Seeking access to restricted accounts. When requesting access to a restricted social media profile or account, the committee said, a lawyer must reveal her identity and the purpose for her request. A lawyer may not, however, request access to the profile of a witness whom the lawyer knows is represented without first seeking the consent of that person's counsel, the committee said, pointing to Rule 4.2.

Instructing agent to request access. The opinion further warns that Rule 8.4(a), which prohibits using others to do things forbidden to lawyers, and Rule 5.3, which governs lawyers' supervisory obligations, preclude attorneys from instructing agents to engage in such investigative chicanery.

Using information acquired by client on own initiative. Does a lawyer act unethically if she uses information that her client has discovered after the client has successfully accessed a restricted social media account? "The answer depends on the extent to which the lawyer directs the client who is sending the request," the committee said, noting that Rules 5.3 and 8.4(a) would then apply.

The same reasoning is used as when a third party volunteers such information, the committee explained:

> The difference in this latter context is that there was no deception by the lawyer. The witness chose to reveal information to someone who was not acting on behalf of the lawyer. The witness took the risk that the third party might repeat the information to others. Of course, lawyers must be scrupulous and honest, and refrain from expressly directing or impliedly sanctioning someone to act improperly on their behalf. Lawyers are barred from violating the rules "through the acts of another."

Full text at http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp.

Trial Conduct

Attorneys Sometimes May Advise Clients To Purge Damaging Social Media Information

Attorneys may in some circumstances advise a client to "take down" social media and online postings that could have an adverse effect on the client's position in a civil matter, the New York County bar's ethics committee concluded July 2 (New York County Lawyers Ass'n Comm. on Professional Ethics, Op. 745, 7/2/13).

The guidance—which focuses on attorneys' obligations in civil matters only—was prompted by what the panel described as "the growing volume of litigation regarding social media discovery."

The "premise behind such cases is that social media websites may contain materials inconsistent with a party's litigation posture, and thus may be used for impeachment," the opinion states.

In light of these dangers, lawyers may have to alert clients to potential consequences of their digital footprints, the committee said. But "ethical rules and concepts of fairness to opposing counsel and the court" may circumscribe how far a lawyer can go, it added.

Summarizing its advice, the panel said:

> An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages. . . . Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed.

21st Century Competence. The committee said there is an increasingly common practice by attorneys and their clients of scouring the social media profiles of litigation opponents or witnesses for information that may be useful to a claim or defense.

"Rather than hire investigators to follow claimants with video cameras, personal injury defendants may

seek to locate YouTube videos or Facebook photos that depict a 'disabled' plaintiff engaging in activities that are inconsistent with the claimed injuries," the committee stated as an example. "Demands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine," it added.

In light of these evidentiary implications, the panel said, "an attorney's duty to represent clients competently could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."

Accordingly, the committee concluded, "an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes."

But competing ethical responsibilities may limit how far a lawyer can go in directing clients to curate their digital profile, the panel added.

Suppression and Spoliation. One such limitation, it said, stems from New York Rule of Professional Conduct 3.4, which provides that an attorney may not "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce" or "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

Substantive law regarding spoliation of evidence also may give rise to a duty to preserve electronic information, the opinion notes.

Determinations as to whether evidence has been wrongly concealed "involve questions of substantive law and are therefore outside the purview of an ethics opinion," the committee stipulated. "But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence," it added, "there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."

Frivolity and Falsity. Advice relating to social media and the use of information in a client's social media profiles also implicates ethics rules governing frivolous claims, the use of false evidence, and truthfulness in statements to others, the committee said.

Under Rule 3.1(a), an attorney has an obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."

"Therefore, if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements," the committee explained.

And while a lawyer is ethically permitted to advise a client to remove harmful online information, the committee said, "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject" under Rule 3.3(a)(3).

Similarly, although the committee concluded that it is ethically permissible to "review what a client plans to publish on a social media page in advance of publication," it noted that an attorney may not, under Rule 3.4(a)(4), "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

Checklist. Offering a list of ethically permissible actions, the committee concluded that a lawyer may:

- counsel witnesses to publish truthful information favorable to a client;
- discuss the content and advisability of social media posts;
- review posts that may be published and that have already been published;
- discuss the possibility that a legal adversary may obtain access to "private" social media pages through court orders or compulsory process;
- advise clients how social media posts may be received or presented by adversaries and review how the factual context of the posts may affect their perception; and
- discuss possible lines of cross-examination.

Full text at http://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

Advertising and Solicitation

Blog Not Intended to Solicit Isn't Subject To Retention Requirements for Advertising

An attorney-authored blog that does not discuss legal topics and is not written for the primary purpose of soliciting legal clients is not an advertisement and thus not subject to the retention and preservation rules that apply to lawyers' online solicitations, the New York State bar's ethics committee advised June 5 (New York State Bar Association Comm. on Professional Ethics, Op. 967, 6/5/13).

The opinion responds to an inquiry from a lawyer who works for a corporation that promotes work-life balance. "In that capacity," the panel explained, "the lawyer will write a blog that will be titled 'The [Inquirer's] Esq. Blog.' The blog will not address legal topics but will include posts about work-life balance."

The inquirer asked whether the blog is an "advertisement" under New York Rule of Professional Conduct 1.0(a), and thus subject to Rule 7.1(k), which provides:

> Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

The committee answered "no" to both questions.

The blog, it explained, is not an "advertisement" under Rule 1.0(a) because "it appears that the inquirer

Conference Report

ABA National Conference on Professional Responsibility

Advertising and Solicitation

Internet Marketing Raises Ethics Issues But Bar Representatives See Few Grievances

SAN ANTONIO—In the landmark case of *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), the U.S. Supreme Court recognized that the First Amendment protects the right of lawyers to advertise their services, subject to state regulation of commercial speech.

But state bar regulators who drafted post-*Bates* rules did not envision the "second generation advertising issues" that would arise when they attempted to apply those rules to lawyer websites, blogs, LinkedIn endorsements, AVVO listings, and other internet-based client development tools, according to Dean Margaret Raymond of the University of Wisconsin Law School.

Raymond moderated a May 31 panel discussion, "Recent Issues Regarding Lawyer Advertising Rules," at the 39th ABA National Conference on Professional Responsibility, which took place May 30-31 in San Antonio.

Panelist Alice Neece Mine, assistant executive director of the North Carolina State Bar, said the attitude of her bar's ethics committee has evolved over the last decade as its members have examined and become more comfortable with lawyers' use of new technologies.

"We are not seeing grievances related to this brave new world."

ALICE NEECE MINE
NORTH CAROLINA STATE BAR

Mine provided a snapshot of issues at the intersection of lawyer ethics and advertising at the beginning of the 21st century, including lawyers' use of Groupon and similar daily-deal websites, "hard" and "soft" client testimonials, endorsements on professional networking sites such as LinkedIn, and opportunities for live chat and advertising favorable results obtained for clients on lawyer websites.

Hunter Redux. Most of the discussion centered on the Virginia Supreme Court's recent ruling in *Hunter v. Virginia State Bar*, 2013 BL 55026, 29 Law. Man. Prof. Conduct 161 (Va. Feb. 28, 2013), in which the court recognized First Amendment protection for a lawyer's blog postings while upholding the bar's authority to discipline the lawyer for not including a disclaimer about case results.

Two of the principals in that litigation were on the panel: Rodney A. Smolla, who represents the disciplined lawyer, Horace Hunter of Hunter & Lipton in Richmond, Va., and James M. McCauley, the Virginia State Bar's ethics counsel.

The decision "serves as a fascinating window into the basket of issues we're talking about," said Smolla, who is also president of Furman University in Greenville, S.C.

The case centered on Hunter's remarks in the blog on his criminal defense firm's website, "This Week In Richmond Criminal Defense." Hunter's posts address legal matters, primarily narratives of public details of his clients' cases and descriptions of favorable results he obtained for them, although he also uses the blog to criticize the criminal justice system.

The Virginia State Bar took the position that Hunter's blog violated the state's lawyer conduct rules in two ways, Smolla said.

First, the bar charged Hunter with violating Virginia Rule of Professional Conduct 1.6 by failing to obtain his clients' permission before describing their cases on his blog. Second, the bar contended that Hunter's blog entries constituted advertising and, under Virginia Rule 7.2, required a disclaimer that all cases are different and that past results are not indicative of future outcomes.

Hunter declined to comply with the disclaimer request and claimed that the bar lacked authority to regulate his blog because it was political speech and not advertising. The bar filed a complaint and the matter proceeded through multiple levels before ending up in the state's top court.

The Virginia Supreme Court held that Hunter must include a disclaimer about case results on his blog as required by Rule 7.2, but it said application of Rule 1.6 to Hunter's blog was unconstitutional.

Smolla said that he has asked the U.S. Supreme Court to review the decision as to Rule 7.2. McCauley said it is unclear at this point whether Virginia's attorney general intends to file a cross-petition on the Rule 1.6 issue.

Benign Motivation. Smolla told the audience that "My client has always been absolutely honest in describing his motivation" in writing his blog: a mixture of political and commercial reasons.

Hunter acknowledges " 'Yes, I was marketing myself, promoting myself, and one of my motives was commer-

cial: to attract clients,' " he said. But, Smolla added, Hunter maintained " 'I was also expressing my identity, letting people know what I think about issues, expressing my politics, [and disseminating] news about the system and criminal defense.' "

Hunter fought the disciplinary charges, Smolla said, because he felt " 'it would cheapen my message to put on my blogs that this is advertising.' "

Smolla said he "argued unsuccessfully that Hunter's commercial motivation, which was one of multiple motivations, could not, in and of itself, turn what was otherwise political speech into commercial speech, so this had to be treated as political speech and the bar could not force Hunter to put an advertising disclaimer on it against his will."

The U.S. Supreme Court has not yet decided whether speech of a business entity, or of a professional with commercial interests, that is facially political can be treated as advertising—and therefore subject to less protection under the First Amendment—whenever one of the speaker's motives happens to be commercial, Smolla stated.

Impact on Clients. McCauley said he was "surprised" at the Virginia Supreme Court's holding on Rule 1.6. He pointed out that one of Hunter's posts named a client charged with possession of cocaine and stated, accurately, that she had tested positive for the substance, and that another post named a schoolteacher who had been charged with assaulting another teacher.

"What about the part of Rule 1.6 about not disclosing information that's detrimental or embarrassing to the client?" McCauley asked.

Unlike Rule 1.6 of the ABA Model Rules of Professional Conduct, Virginia's Rule 1.6 retains the "confidences and secrets" concept of the ABA Model Code of Professional Responsibility and, with certain exceptions, prohibits a lawyer from revealing "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation."

What Is 'Public'? McCauley observed that although all of the client information Hunter posted had previously been revealed publicly in court proceedings, but for his blog postings it would not have been readily available to, for example, potential future employers of those clients who might use internet search engines to screen applicants.

Whether information is in the public record, McCauley said, is not always clear.

"Often transcripts [of public court hearings] are not made if they're not needed or not filed with the court, so once the case is over, that information evaporates," he said. "This is clearly not information that is 'generally known' for purposes of Rule 1.9(c)," which governs a lawyer's duties to former clients, McCauley stated.

The speakers and audience members who joined the discussion came to no clear conclusion as to whether the *Hunter* decision would permit a lawyer to notify a former client's employer of negative, but previously publicly disclosed, information, or whether a contrary result would forbid an appellate lawyer from citing and discussing a publicly reported case the lawyer had handled for a previous client that was favorable authority for a current client.

Few Complaints. The bar representatives on the panel commented that grievances related to lawyers' marketing efforts are—so far, at least—usually not related to internet-based activities.

"We are not seeing grievances related to this brave new world," Mine remarked. Instead, she said, most bar complaints about advertising in North Carolina continue to relate to failures to include direct mail disclaimers and result in letters of warning or, occasionally, reprimands.

In Virginia, "Nearly all the complaints we receive [regarding lawyer advertising] are complaints from the economic competitors of the lawyer they're complaining about," not from clients or nonlawyer members of the public, McCauley reported.

Disclaimers. "We seem to think that we fix a lot of problems with disclaimers," Raymond observed to the panel. "Convinced?"

"I have my doubts," Mine admitted. "We use the internet a lot and use it quickly. I routinely accept all the terms and conditions" when presented with a terms of use agreement or disclaimer, she said.

"We don't have any empirical evidence," McCauley acknowledged. "We've been challenged by our opponents to produce evidence that the consumer is misled by a statement without the accompanying disclosure. Our bar's response is that if we can establish that the statement is inherently misleading, we win."

By Helen W. Gunnarsson

Corporate Counsel

In-House and Outside Counsel Often Divided On Issue of Advance Waivers, Panelists Say

SAN ANTONIO—Although large corporations can be lucrative clients for law firms they hire, a corporate client's size can be a negative if the business owns several subsidiaries or affiliates.

In such instances, conflict of interest rules may preclude a firm from suing or opposing any of its client's component entities. If the client's corporate family tree is sprawling, experts say, a law firm will lose significant opportunities that could outweigh the value of the parent company's business.

Law firms can avoid being handcuffed in this way by obtaining advance waivers from prospective and existing corporate clients—but taking that protective measure is much easier said than done.

That lament was voiced repeatedly by speakers at the 39th ABA National Conference on Professional Responsibility, held here May 30-31.

Large companies, the panelists said, are wary of agreements that would allow their outside counsel to attack any members of the corporation's extended family in matters they handle for other clients.

The problem is compounded, they added, by the fact that firm partners engaged in client development are aware of that distaste and reluctant to broach the issue of advance waivers with the corporate executives and in-house counsel.

News

Advertising and Solicitation

Lawyers May Blog About Completed Cases But Must Include Disclaimer in Ethics Rule

Lawyers who blog about their cases to boost their practice do not need to get their clients' consent to discuss public information in completed matters, but these posts aren't exempt from restrictions on lawyer advertising, including the need for a disclaimer about past results, according to the first appellate decision addressing application of the First Amendment to lawyer weblogs.

In a widely watched disciplinary case, the Virginia Supreme Court Feb. 28 held that a criminal defense lawyer's posts on his firm's website about the results he has obtained for clients are "potentially misleading commercial speech" that must be accompanied by a disclaimer required under Virginia lawyer advertising rules (*Hunter v. Virginia State Bar*, Va., No. 121472, 2/28/13, aff'g in part, rev'g in part 28 Law. Man. Prof. Conduct 481).

The majority concluded that, viewed as a whole, the lawyer's blog posts constitute an advertisement for his practice even though they include some commentary on the criminal justice system.

Two justices disagreed, contending that the posts are political speech that is protected by the First Amendment from the burden of a state-mandated disclaimer, even if the lawyer had a commercial motivation for the blog.

"[A] lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."

VIRGINIA SUPREME COURT

Notably, however, the court also held that the blogger, Richmond, Va., attorney Horace F. Hunter, does not have to obtain his clients' consent to blog about public information relating to cases that are no longer pending, even if the clients will be embarrassed or suffer a detriment if the details are made available on the internet. Lawyers are no more prohibited than other citizens from reporting what happens in court, Justice Cleo E. Powell declared in her opinion for the court.

Headed for Highest Court. "It's a 50-50 decision," said First Amendment expert Rodney A. Smolla. He represents Hunter in the case and told BNA that they plan to petition the U.S. Supreme Court for review.

"Obviously we believe the dissenting opinion on the commercial speech issue is the most persuasive view," Smolla said. He is president of Furman University in Greenville, S.C.

Smolla said that in the last decade the U.S. Supreme Court has been "relatively robust" in its protection of commercial speech and political speech, but that whether those decisions apply with full force to the legal profession is unresolved. "I hope the Supreme Court sees it will be useful to the bar" to grant review and clarify the application of First Amendment protections, he said.

According to James M. McCauley, ethics counsel for the Virginia State Bar, the court's holding demonstrates that "lawyer advertising on blogs is not different from lawyer advertising anywhere else."

Lawyers who communicate with the public through a blog should read the court's discussion of how blogs may be regulated under a commercial speech standard as opposed to a strict scrutiny standard, he told BNA.

Commercial Speech. The court agreed with a three-judge disciplinary panel that Hunter violated two Virginia Rules of Professional Conduct by omitting an advertising disclaimer from summaries of his cases he posted on his blog, *This Week in Richmond Criminal Defense*.

Rule 7.1(a)(4) forbids communications by lawyers that are "likely to create an unjustified expectation about results the lawyer can achieve," and Rule 7.2(a)(3) forbids advertisements that advertise specific or cumulative case results unless they include a disclaimer that meets certain content, placement, and format requirements.

The Virginia State Bar contended that Hunter's blog posts were inherently misleading without the required disclaimer, while Hunter and Smolla maintained that the blog is political speech that may not be burdened with a disclaimer requirement.

The court concluded that "Hunter's blog posts, while containing some political commentary, are commercial speech." In reaching these conclusions, it pointed out that:

- Hunter's motivation for the blog was admittedly at least part economic.
- The posts predominantly described cases in which he received a favorable result for his client.
- The posts referenced a specific product—his lawyering skills—in that 22 of the 25 case summaries described cases he successfully handled.
- Hunter named his law firm in addition to himself in 19 of these posts.
- The blog is on his law firm's commercial website (Hunter & Lipton PC) rather than an independent site dedicated to the blog.
- The website uses the same frame for soliciting clients as it does for the blog.

■ The blog does not allow for discourse about the cases, whereas noncommercial blogs often do so by allowing readers to post comments.

Hunter did not transform the blog into political speech, the court said, by including five general legal posts and three discussions about cases he did not handle.

"When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product," the court found.

'Atypical' Blog. Kevin O'Keefe, publisher and chief executive officer of *LexBlog*, emphasized in an interview with BNA that the court did not say all lawyer blogs amount to commercial speech.

Rather, he said, the court looked at the totality of this particular blog and concluded that it is commercial speech, without generalizing that holding to all blogs.

O'Keefe, who uses his site "Real Lawyers Have Blogs" to comment on the law and marketing, distinguished between most lawyers' blogs, which provide insight and commentary, and Hunter's "atypical" blog, which the court found to be an advertisement of his results.

"Lawyers shouldn't read the case as saying you have to put disclaimers on all your social media," he told BNA. "I won't advise my clients to put a disclaimer on their blogs."

Disclaimer Requirement Upheld. Under the standards in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), commercial speech is entitled to First Amendment protection if it concerns lawful activity and is not misleading. For a restriction to be upheld, the government must assert a substantial interest in the restriction, the limitations must directly advance that interest, and the regulation must be narrowly tailored to achieve that interest.

Applying those standards, the court ruled that although Hunter's blog posts discussing lawful activity are not inherently misleading, "they have the potential to be misleading."

"Lawyers shouldn't read the case as saying you have to put disclaimers on all your social media."

KEVIN O'KEEFE
LEXBLOG

The state bar has a substantial interest "in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter," Powell said.

The court found that the bar's disclaimer requirement directly advances this interest and is no more restrictive than necessary, unlike outright bans on advertising. Accordingly, it concluded that Rules 7.1 and 7.2 do not violate the First Amendment as applied to Hunter's blog posts.

The court also decided, however, that the three-judge disciplinary panel erred by allowing Hunter to use a lesser disclaimer that does not meet all the requirements of Rule 7.2(a)(3).

Whereas the panel directed Hunter to use a single disclaimer on the blog, the rule itself requires a disclaimer to be included on all case-related posts in the specific manner and format set out in the rule, the court explained.

Dissent: Can't Mandate Disclaimer. In a dissenting opinion joined by Justice Elizabeth A. McClanahan, Justice Donald W. Lemons contended that the posts on Hunter's blog are political speech protected by the First Amendment and that he cannot be forced to include the advertising disclaimer.

Lemons emphasized that Hunter's blog describes how criminal trials in Virginia are conducted and explains how the acquittal of some of his clients has exposed flaws in the criminal justice system. This is not commercial speech, he contended, merely because Hunter mostly discusses his victories or because the blog is accessed through the law firm's website and is not interactive. "The mere existence of some commercial motivation does not change otherwise political speech into commercial speech," he added.

The bar did not produce evidence that anyone has found the posts to be misleading, Lemons also pointed out, saying there appears to be little public benefit from requiring Hunter to post a disclaimer conceding that his article are advertisements.

Disclaimer Decision Bucks Trend. In an interview with BNA, Virginia ethics expert Thomas E. Spahn said that "the trend in most states favors treating lawyer advertising like other advertising," and that "most states are moving in the opposite direction" from this decision on the issue of requiring disclaimers. "I think disclaimers that are too severe will not survive scrutiny," Spahn added. He practices with McGuire Woods in Tysons Corner, Va.

Spahn said he believes it is insulting to the public to assume that people can't make up their own minds about advertising, so long as the information is truthful. People who read a lawyer's description of a case won't be fooled into thinking those same results are guaranteed in their own case, he said.

Thomas R. Julin, whose practice with Hunton & Williams in Miami focuses on First Amendment litigation, told BNA the case illustrates the difficulty that appellate courts are having with the commercial speech doctrine.

Some have suggested, Julin noted, that the Supreme Court should do away with the distinction between political and commercial speech and instead treat all speech as fully protected by the First Amendment. "This case could provide the vehicle for the Court finally to give commercial speech the full protection that it deserves," he said.

On the other hand, Julin said, the Supreme Court also might be inclined to take this case to make clear that its definition of "commercial speech" does not include the type of speech at issue here. In its most recent commercial cases, he explained, the court has said that commercial speech does nothing more than propose a commercial transaction, and it has rejected the concept that economically motivated speech receives less First Amendment protection.

"In any event, I do not think the Supreme Court would agree that the disclaimer requirement is justifiable under the First Amendment merely because the presentation of certain case results is potentially misleading," Julin said.

Although the Supreme Court said in *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), that restrictions could be placed on lawyer advertising, consumers are much more skeptical about advertising now, and have more information available to check out what lawyers say, he pointed out.

Julin also said that boilerplate disclaimers are ineffective. "No one reads or understands them," he asserted.

Confidentiality Rule. In the other major aspect of the *Hunter* decision, the court held unanimously that the lawyer did not violate Rule 1.6 on lawyer-client confidentiality by including in his blog postings public details about his clients' concluded cases.

Virginia's Rule 1.6 forbids a lawyer to disclose information obtained in the attorney-client relationship if the disclosure "would be embarrassing or would be likely to be detrimental to the client," unless the client consents after consultation.

Notwithstanding that restriction, Hunter has a First Amendment right to blog about his cases, the court concluded. It distinguished decisions cited by the state bar, saying they involved pending proceedings.

Citing *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991), the court said it is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case.

All of Hunter's blog posts involved matters that had been concluded, the court pointed out. Moreover, it commented that all of the information in Hunter's blog was already public and would been protected speech had it been disseminated instead by the news media or others.

"State action that punishes the publication of truthful information can rarely survive constitutional scrutiny," Powell declared.

The state bar contended that if lawyers were permitted to repeat information made in public judicial proceedings, clients would be inhibited from talking to their attorneys and public confidence in the legal profession would be undermined.

Those concerns were unsupported by the evidence, the court said. "To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections," the court stated. "In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."

'Vindication of First Amendment Rights.' McCauley told BNA that the bar's Standing Committee on Legal Ethics "will be studying the issue and will report and make recommendations to the bar's leadership regarding what further action should be taken."

But Julin called this aspect of the *Hunter* decision "a wonderful vindication of First Amendment rights that is long overdue."

"It may not be wise for a lawyer to talk about a case in a way that is embarrassing or insulting to a client or former client, but once the facts about a client's problems are known, lawyers should be as free to talk about those facts and comment on them as any other citizens, just as the court holds here," Julin said.

In comments to BNA, Massachusetts attorney and blogger Robert Ambrogi said the court's key holding is that "the bar cannot prohibit an attorney from blogging about truthful information made in a public judicial proceeding," even when the commentary is by a lawyer who was directly involved.

The court was careful to distinguish lawyer commentary about pending cases, Ambrogi pointed out, noting that the proceedings Hunter wrote about were concluded matters. "Lawyers do not have the same freedom to blog about pending cases; rather, they have to avoid any public statements that could prejudice a client's case," he said.

Ambrogi said that in his opinion "lawyers should always think twice before blogging about their own cases." It is okay, he suggested, to blog in general terms about outcomes that are public, such as success in a jury trial or a winning appellate argument. "But lawyers should avoid talking about pending matters and avoid ever getting too deep into specifics," he recommended.

No Secret Trials. Speaking with BNA after the decision was issued, Hunter said he never hid that his blog was partly for marketing his practice. But as the dissent points out, he commented, the blog explains and discusses the criminal justice system and perceived problems with it, such as overbroad use of federal RICO charges.

Hunter said that First Amendment protection should not depend on whether readers are able to submit comments or whether the blog is separate from the firm's website. It is expensive to have two separate websites, and if comments are invited the site has to be monitored constantly to prevent people from engaging in spam and trash talk, he said.

On the confidentiality issue, Hunter said the case sets a bright-line rule that client consent is not required to disclose what happened in a public court proceeding. "We do not have secret trials in this country," he stated.

But Hunter said that from now on he plans to get client consent as a courtesy when a "small case" that has not been publicized involves big issues that he wants to write about.

By Joan C. Rogers

Full text at http://op.bna.com/mopc.nsf/r?Open=kswn-95cqjd.

Private Firm

Liquidation Plan of Dewey & LeBoeuf Approved by Bankruptcy Court in New York

The U.S. Bankruptcy Court for the Southern District of New York Feb. 27 approved the second amended liquidation plan of defunct law firm Dewey & LeBoeuf (*In re Dewey & LeBoeuf LLP*, Bankr. S.D.N.Y., No. 12-12321 (MG), *plan approved* 2/27/13).

Judge Martin Glenn concluded that the firm's Chapter 11 liquidation plan is in the best interests of creditors and the estate. According to Glenn, requirements of the Bankruptcy Code have been satisfied and the plan was proposed in good faith. Furthermore, he ruled, the plan is feasible and has a reasonable likelihood of success.

Dewey filed its Chapter 11 liquidation plan and disclosure statement Nov. 21, 2012.

According to court documents, more than $71 million will be returned to the estate by participating partners, representing approximately 80 percent of the total partner contribution amount sought by the debtor in connection with the partner contribution plans (PCPs).

After Dewey filed for Chapter 11 protection May 28, 2012 (see 28 Law. Man. Prof. Conduct 341), in the wake of partner resignations and an investigation into alleged improper activity by a senior manager, the debtor and former partners entered into PCP settlements. Following an evidentiary hearing Oct. 9, 2012, the court approved the terms of the PCPs. See 28 Law. Man. Prof. Conduct 659.

Plan Provisions. The firm liquidation plan provides for seven classes, and classes 2, 3, and 4 voted in favor. Class 5 changed its vote in favor of the plan on the date of confirmation, court documents indicate.

All allowable statutory fees, administrative claims, and priority claims will be paid as required, according to the record. The plan provides a framework for liquidating and distributing the debtor's remaining assets on an absolute priority basis through two trusts—the secured lender trust, and the liquidating trust.

Each holder of a class 5 insured malpractice claim will be paid to the extent there is coverage, solely from the proceeds of any applicable malpractice policy with respect to the insured portion of the claim, court documents indicate.

'New Template for Future Cases.' "This plan is a tribute to the partners pulling together and being responsible," Al Togut of Togut, Segal & Segal, New York, who represented Dewey, told Glenn at the hearing, noting that it is in stark contrast to other law firm bankruptcy cases. According to Togut, "Chapter 11 works best when it's consensual. This case is living proof that that is right."

Togut predicted that this plan has created a "new template for future cases."

"Never again will these cases deteriorate into endless litigation. Instead, I predict that what we've done here will lead to more PCPs and more consensual cases. What we've done is good for the legal profession. It will raise the reputation of lawyers," he said.

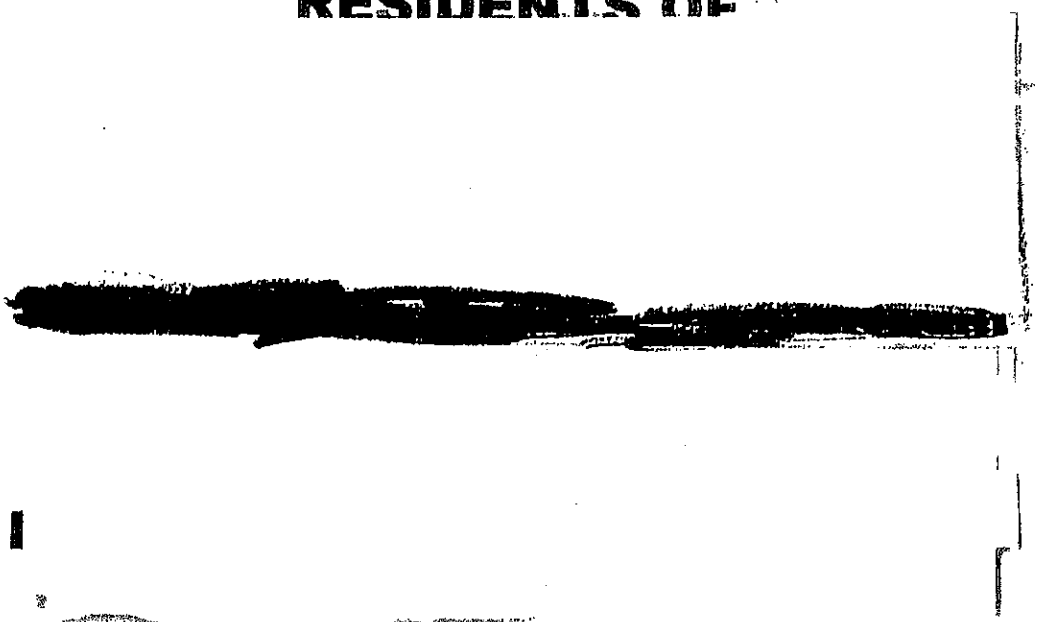
Full text at http://www.bloomberglaw.com/public/document/Dewey__LeBoeuf_LLP_Docket_No_112bk12321_Bankr_SDNY_May_28_2012_Co.

GENERATING NEW BUSINESS TODAY & IN THE FUTURE:

5 EXAMPLES OF PROBLEMATIC ATTORNEY ADVERTISING

ATTENTION – CURRENT OR FORMER

RESIDENTS OF [redacted]



On [redacted] August 20[redacted] the [redacted] Law Firm conducted an investigation under the protection and guidance of a Court Order. ([redacted]) Our Certified [redacted], [redacted] PhD, has confirmed through inspecting, gathering samples and lab testing that dangerous mold is present in some common areas of [redacted] and in some of our client's apartments.

Mark B. Moody

From: Mark B. Moody
Sent: Wednesday, August 21, 2013 3:13 PM
To: [redacted]
Subject: [redacted]

Mr. [redacted]

I am writing in response to your letter today requesting an ethics opinion from this office. In response to your request, I am providing you the following which is an informal opinion of the Office of General Counsel and is not binding on the Disciplinary Commission of the Alabama State Bar.

I have some concerns with your proposed advertisement. They are:

(1) Rule 3.6(b)(3), Ala. R. Prof. C., is implicated with your proposed advertisement. Please see the following URL for the exact language contained in Rule 3.6, Ala. R. Prof. C. http://www.sunethics.com/al_3_6.htm. Additionally, you can find Rule 3.6, Ala. R. Prof. C., on page 999 of your 2013 Alabama Rules of Court. Your proposed advertisement makes multiple references to testing results. As a result, I would be very careful how you word an advertisement referencing test results so as to not run afoul of Rule 3.6, Ala. R. Prof. C.

(2) Please be clear that Rule 7.1 requires all statements included within your proposed advertisement not be false or misleading. There are a lot of facts included within your proposed advertisement. I advise that you make 100% certain any and all statements contained in your proposed advertisement are not false or misleading.

(3) Please make sure the Rule 7.2(e), Ala. R. Prof. C., disclaimer is included on the same page as the rest of your advertisement. In other words, I advise against placing the disclaimer on its own page separate and apart from the rest of the advertisement.

(4) I advise following Rule 7.3(b)(2)(v), Ala. R. Prof. C., and include the word "Advertisement" in red 14 point font.

(5) I advise including the following phrase at the beginning of the proposed advertisement, "[i]f you have already retained an attorney in connection with this situation at [redacted], please disregard this advertisement."

(6) I advise against offering snacks and refreshments as potential inducements for attending this seminar.

(7) Lastly, please be advised that Rule 7.3, Ala. R. Prof.C., expressly forbids you, members of your firm, or agents of your firm from soliciting people who attend this seminar.

If you have any further questions please do not hesitate to contact me.

Thanks,

Mark

Mark B. Moody
Assistant General Counsel

Name Redacted: Letter too long Nobody will read all That ↓

RE. [redacted]

Dear [redacted]

If you have already hired or retained a lawyer in connection with any financial problems that you may or may not have, please disregard this letter.

You have been identified as a person that may have serious debt or financial problems. If this is incorrect, please disregard this letter. We identified you as possibly have financial problems through examination of the public records for [redacted] County, Alabama. **Our firm has assisted thousands of clients either completely eliminate their debt or significantly reduce their debt** through the use of the federal bankruptcy laws as well as other federal and state laws.

Creditors use various tactics in attempts to collect debts; such as harassing phone calls, lawsuits, repossessions, garnishments and foreclosures. We have successfully stopped all these types of collection activities. I would like to help you understand your rights and protect you from your creditors.

Creditors could even try to take your house. However, in most cases, they are more interested in repossession of a car or garnishment of your wages. If a creditor gets a garnishment, they can take up to 25% out of each of your paychecks. For example, if you paycheck was $600.00 before a garnishment, it would be $450.00 after a garnishment. For many people, having their income reduced to such an extent causes them to fall behind on other bills, such as their home. Falling behind on the home leads to foreclosures or evictions. In many cases, trying to keep up payments on a home, support a family and having the garnishment also just leads to falling behind on other bills and then having more garnishments as soon as the first one ends. The old saying, "prevention is worth a pound of cure" has never been more true than when dealing with creditors in the 21st Century. If you have debt problems, even if they seem small today, give us a call so that we can help you avoid your small debts from turning into big debts. We are here to serve you.

We can force most of your creditors into a payment plan you can afford (known as a Chapter 13 or Debtor's Court) or we can use a Chapter 7 (often referred to as a straight bankruptcy) to completely eliminate your debts.

We generally charge [redacted]* and up for Chapter 7s (depending on the complexity of the case as well as the income of the client). **We have charged as little as $0.00* for extremely needy clients; however, due to the need to feed ourselves, our ability to do this is extremely limited.** We have charged near [redacted] for wealthier clients with extremely complex Chapter 7s. We do have payment plans for our Chapter 7 clients.

In Chapter 13s, we generally charge no attorney fee* up front with the attorney fee being paid as a part of the payments that are paid over a 3-5 year plan. Our rates for Chapter 13s are competitive with the other Attorneys in the area.

You may call our office for a **free appointment** in [redacted] **or toll free** at [redacted]. I look forward to **STOPPING** your creditors and helping you obtain a fresh start. Also, enjoy the easy to find and free parking at our building.

Really?

Everyone will ask for this now.

Nice Qualifier

* Attorney's Fees do not include filing fees, credit briefing and financial management fees which all Attorneys are required to file. Said fees are in addition to the Attorney's fees. In some cases, subject to ruling of the Court, we have been able to get Bankruptcy filing fees waived. We reserve the right to charge whatever amount we are charged for credit reports. We make our money only from the Attorney's fees and receive no personal compensation for the filing fee, credit briefing fee, financial management fee or credit report fee. The filing fee for a Chapter 7 is set by the Courts at $306.00. The filing fee for a Chapter 13 is set at $274.00 and is normally paid through the Chapter 13 payment plan over 3-5 years. The credit briefing fees are approximately $34.00. The financial management fees are approximately $8.00.

No representation is made that the quality of legal services to be performed is greater than the quality of the legal services provided by other lawyers. We are proudly a Debt Relief Agency and Attorney at Law who helps people file for bankruptcy relief under the Bankruptcy Code.

Name Redacted but way too generic. I don't know your name.

CENTER - ALABAMA, LLC

and Surrounding Counties

from $499.00*

- Municipal Court Cases • DUI • Drug Court
- State District Court Cases • Criminal and Civil
- Uncontested Divorce • Youthful Offender
- Probate Court Guardianships / Conservatorships

from $99.00

- Wills • Power of Attorneys • Trusts • Deeds

WW Name Redacted but Firm name way too generic m

CALL US TODAY

** No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyer*

Attorney at Law

THE

May 11, 2013

Dear Prospective

If you already have hired or retained a lawyer in connection with your criminal matter, please disregard this letter.

Court records indicate that you have recently been charged with a criminal offense. Life has taught me that **SOMETIMES EVEN GOOD PEOPLE GET CAUGHT UP IN BAD SITUATIONS!** I firmly believe that our American justice system demands that ***every*** person charged with a crime is entitled to a fair trial and to have all of your rights protected throughout each stage of the criminal process. If you would like to contact me for a **free consultation** about your criminal case, you may do so with the contact information listed above and below. Either way, I wish you well in the handling of your criminal matter. Thank you.

Sincerely,

↳ What?
I know nothing about
your services.
Does this really work?

d is greater than the quality of legal

ADVERTISEMENT

GENERATING NEW BUSINESS TODAY & IN THE FUTURE:

YOUR FIRM'S COMPETITION

(NEXT 16 PAGES)

"End of Lawyers" Richard Susskind

Frederic S. Ury
Ury & Moskow, LLC
Fairfield, Connecticut

Thomas Lyons
Strauss, Factor, Laing & Lyons
Providence, Rhode Island

The Future Of The Legal Profession.

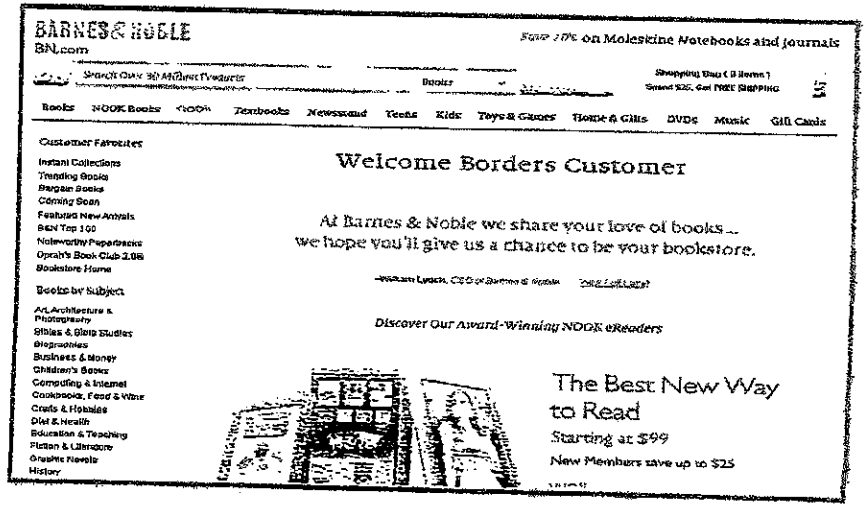
Introduction.

- Change in every industry is occurring faster than ever before.
- Legal profession is no exception.
- We need to plan our future and not just react to change.
- Our members are trying to deal with disruptive change.

Change: It's all about delivery.

- Legal services are not going to disappear. They will be delivered differently.
- Mail: Pony Express, email to tweets.
- Music; news; books; consumer products, and services.
- Border's Books and Blockbuster.
- Television, Cable and Netflicks.

Barnes & Noble.



Five trends affecting the legal profession

Globalization.
Technology.
Nature of clients.
Demographics.
Legal education.

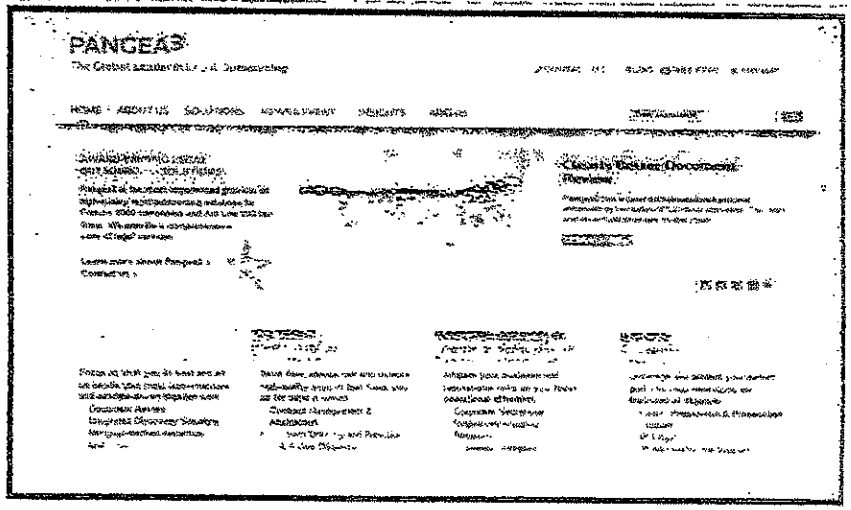
Globalization.

- Over one million lawyers in India are willing to work for much less than American attorneys.
  Rates $25-50 per hour.
  Outsourcing overseas and to attorneys in the US.
  Ethical issues concerning supervision.
- We are a net exporter of legal services by billions.

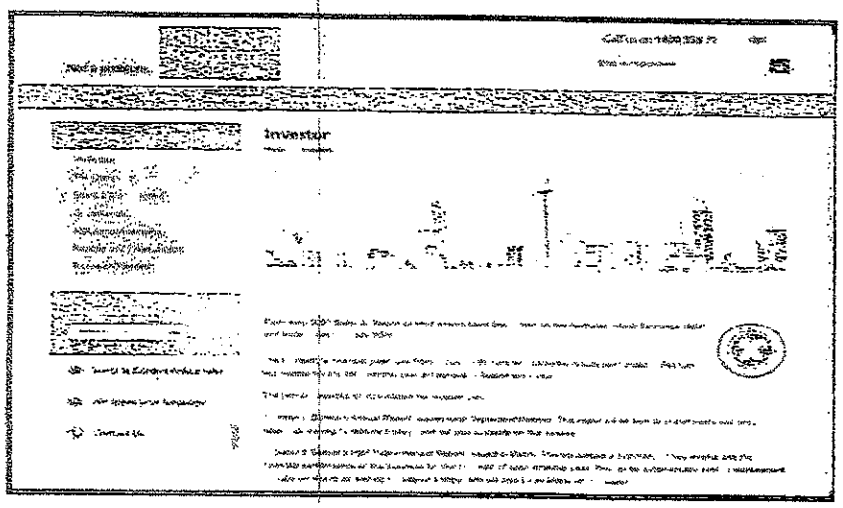
Pangea3 and Other outsourcing.

- Bought by Thomson Reuters.
- In 2011 opened a 400 seat office in Texas.
- Outsourcing is returning to the US because of a glut of newly minted attorneys who would rather work for $50,000 or more than not work at all.
- Integreon: Fargo North Dakota.
- UnitedLex: Based in Kansas.

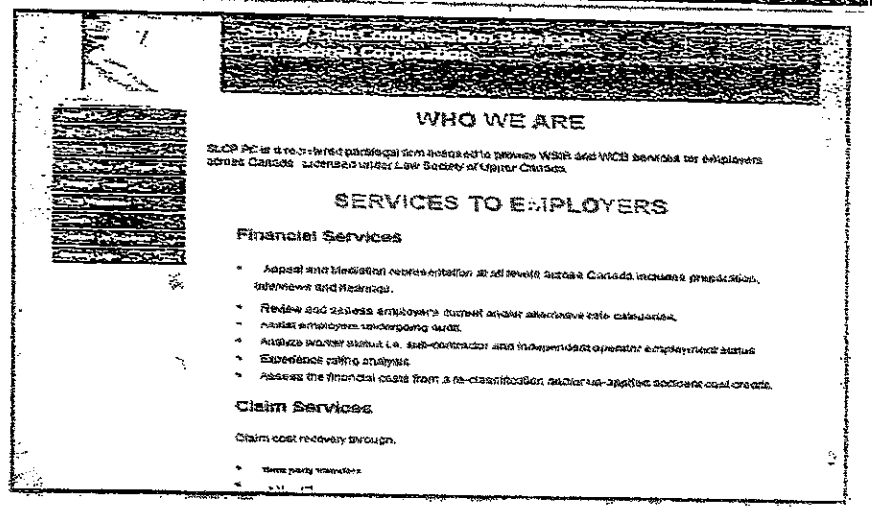
Pangea3 legal outsourcing.



Slater & Gordon.



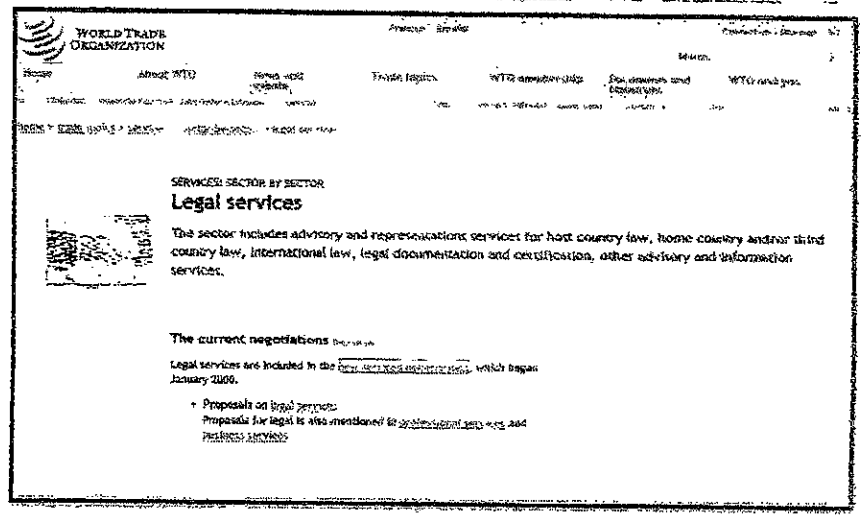
Stanley Lam paralegal.



General agreement on trade in services.

- GATS is a treaty of the World Trade Organization entered into in 1995 and signed by the United States.
- Most attorneys have never heard of this. Legal services are part of this treaty.
- US exported $6.7 Billion of Legal Services. and imported $1.6 Billion in 2007 and continued in 2008.

World Trade Organization.



Technology.

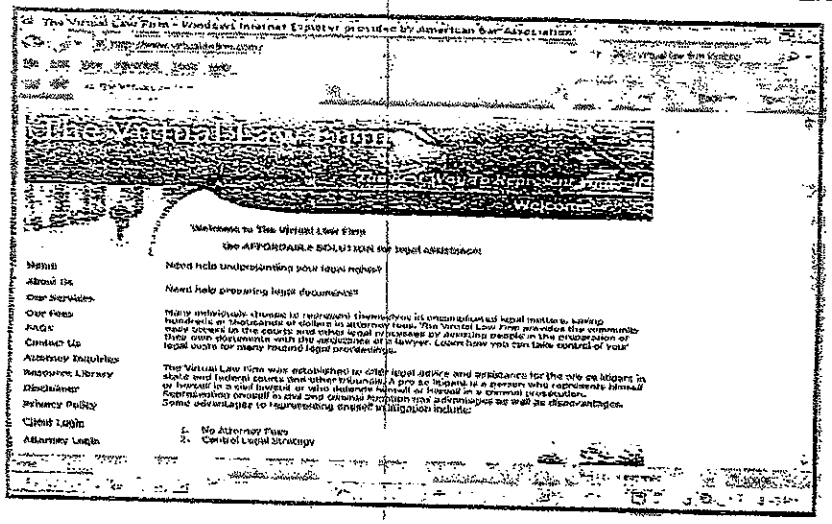
- Nothing has changed the practice as much as technology.
- Small firms can compete with large firms for large transactions or complex litigation.
- Every law firm no matter what size has the same access to legal resources.
- Our clients have the same access to legal resources.
- Allows firms to join together: Co-sourcing.

[Google scholar Free legal research]

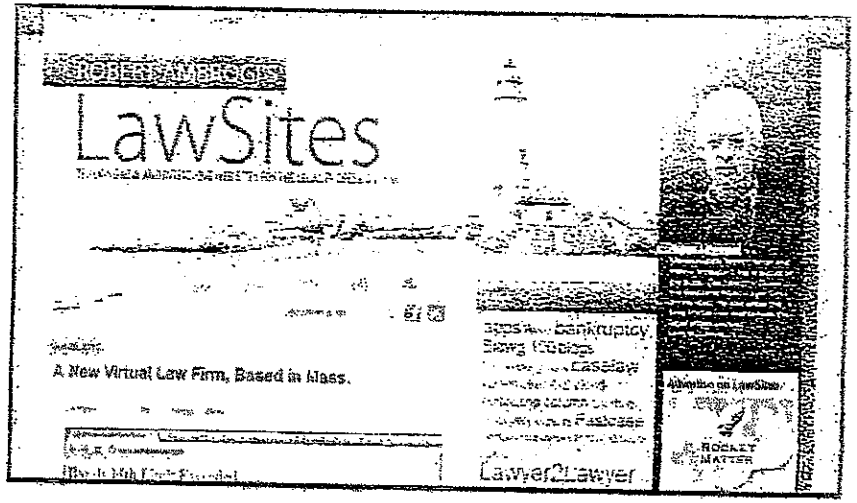
Virtual law firms and cloud computing.

- E-law firms, combined with outsourcing and co-sourcing, can build a nationwide network of law firms.
- UPL and regulatory considerations.
- Cloud computing and confidentiality.
- Grads who cannot find work are opening virtual law firms without mentoring.
- Opportunity for Litigation Section?

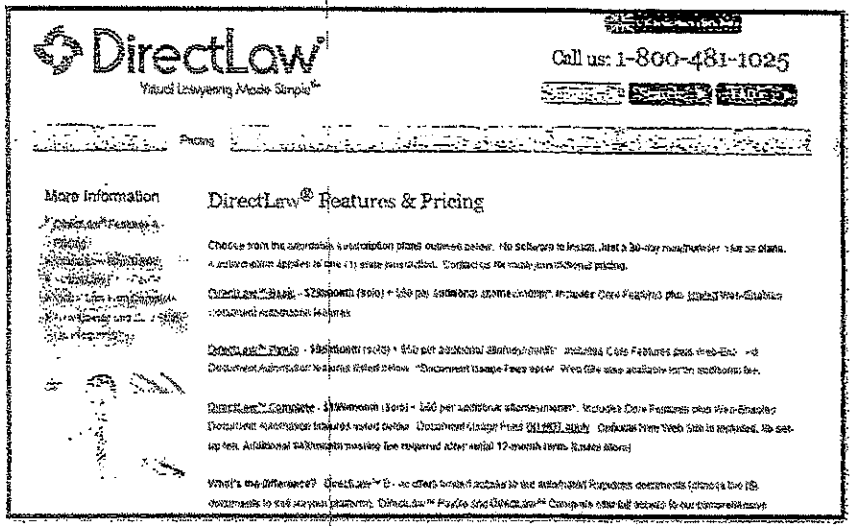
The virtual law firm.



Tracking law sites on the web.



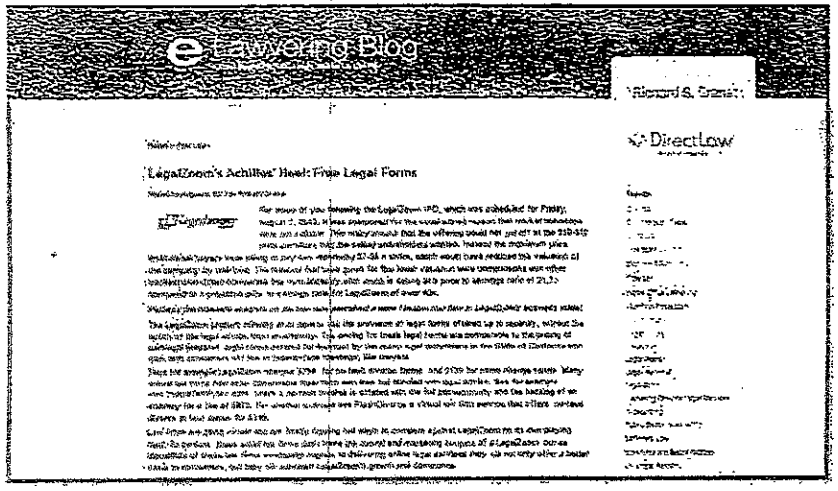
DirectLaw.



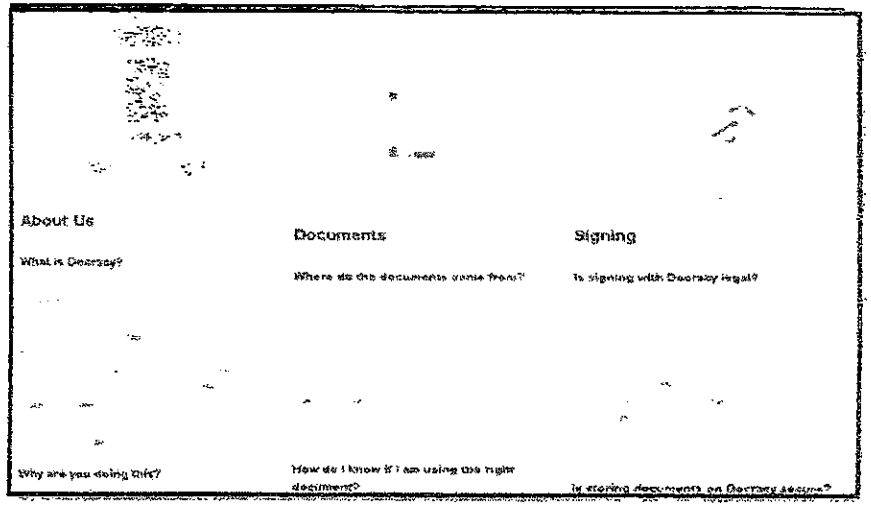
Why pay for something you can get on the internet for free?

The internet is the primary source for information. Example: www.webmd.com.
Our children have grown up using the internet to research, study, answer questions, shop, socialize, and play.
Easy access to legal answers on the internet will change how people use attorneys.
Music industry, newspapers, and books.

elawyering Blog.



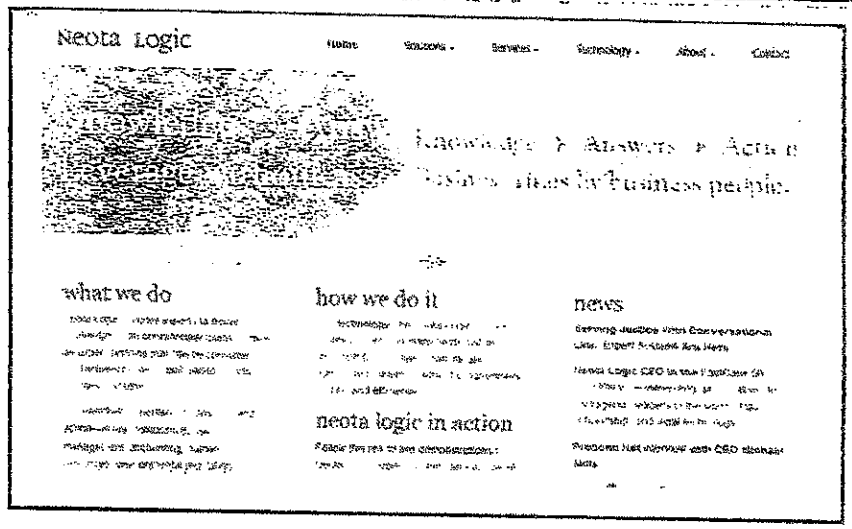
Documents for free: Docracy.



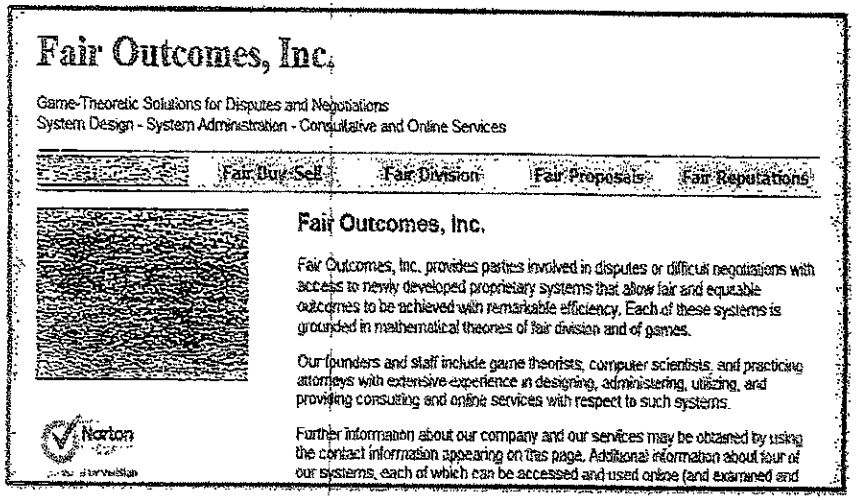
Search is changing access to justice.

- True access to justice for all will occur when the ability of computers to search improves to the point where anyone can find answers to everyday legal problems quickly and easily. Artificial intelligence along with search.
- Fair Outcomes, Inc.
  Connecticut legal aid network.
  Google scholar.
  Disruptive technology.

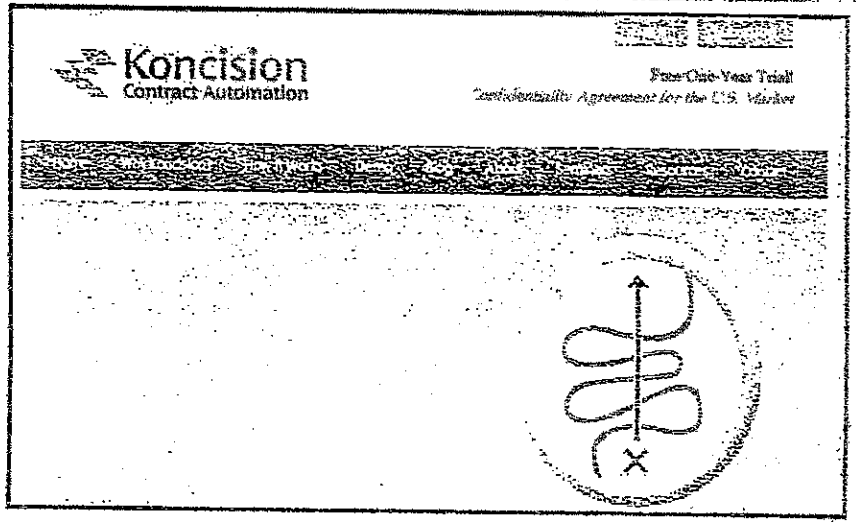
Neota Logic.



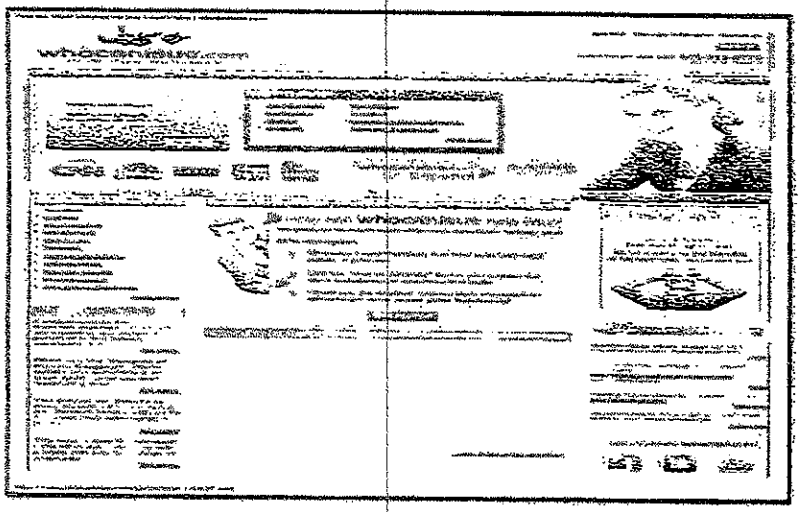
Fair Outcomes, Inc.



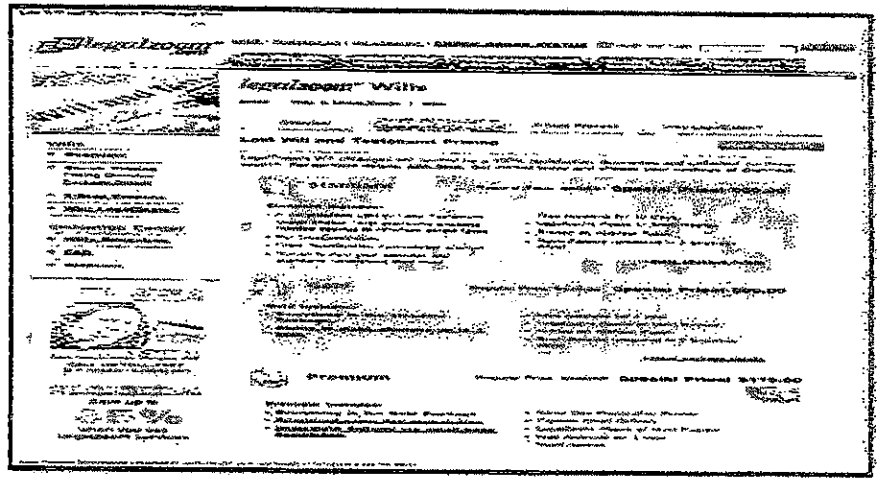
Koncision.



Who can I sue?

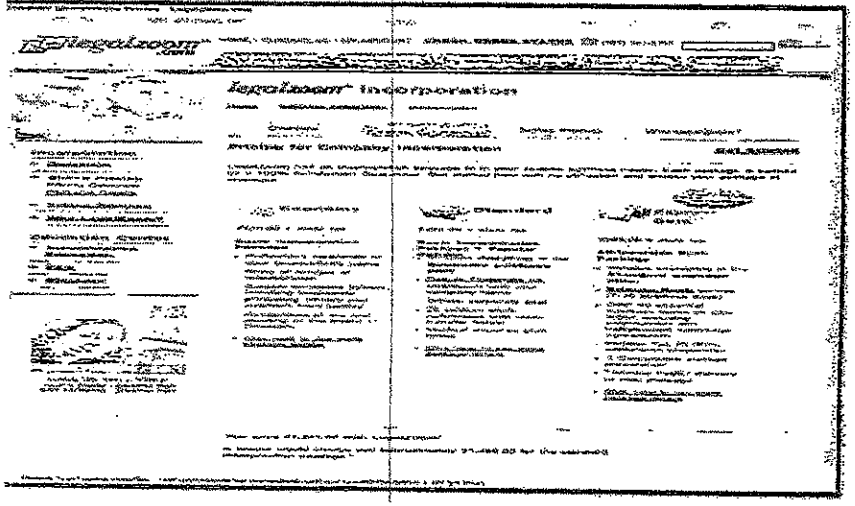


Legalzoom.com wills.

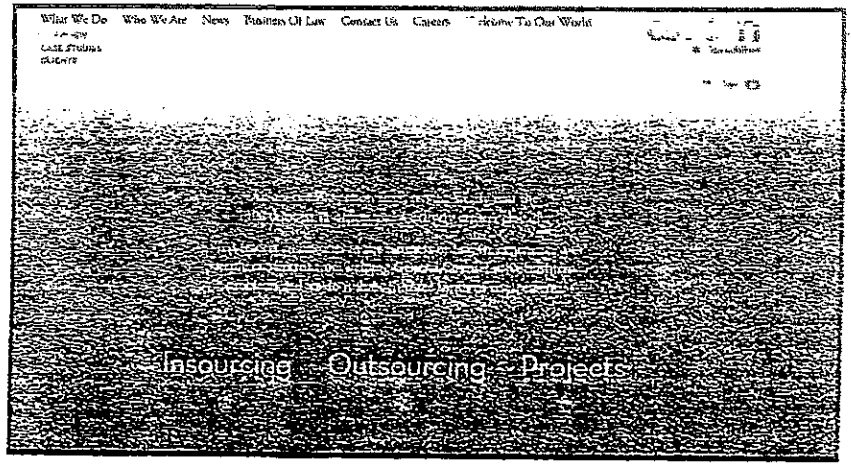


"NOT a "law" firm" "business law"

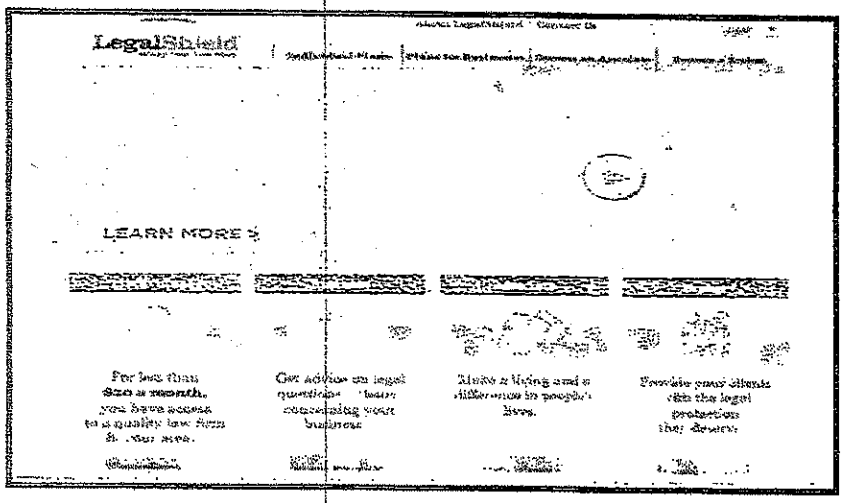
Legalzoom.com incorporation.



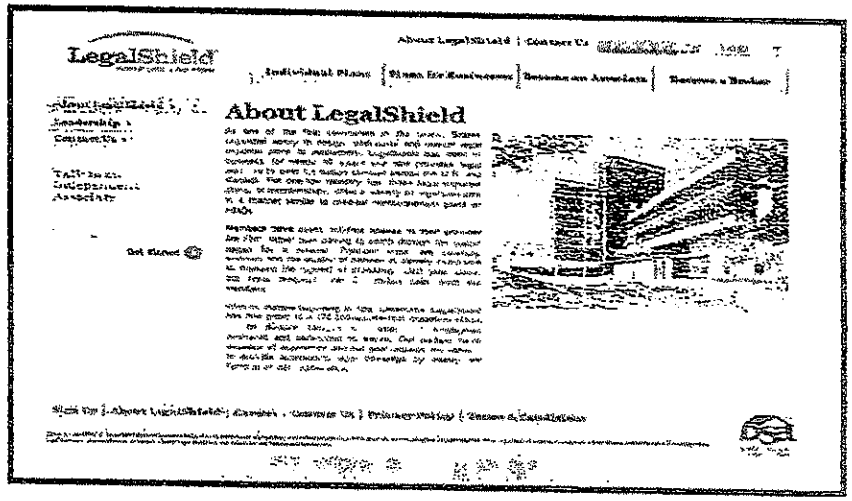
Axiom.



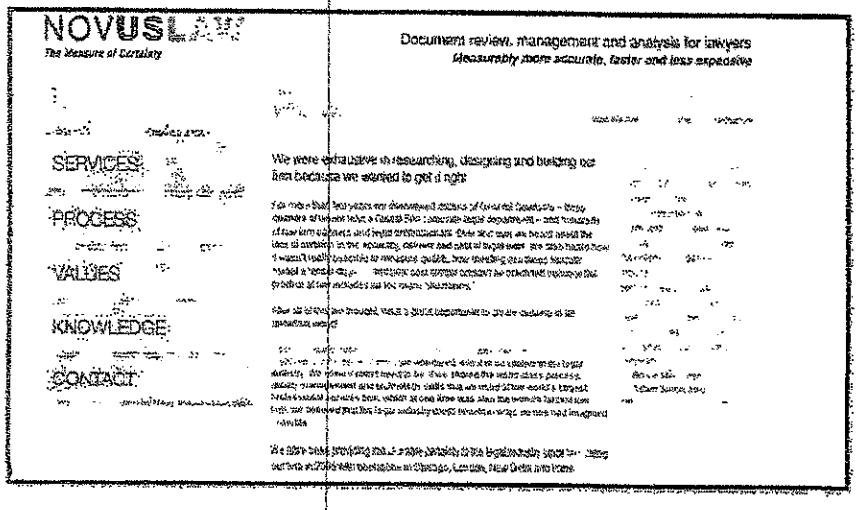
LegalShield.



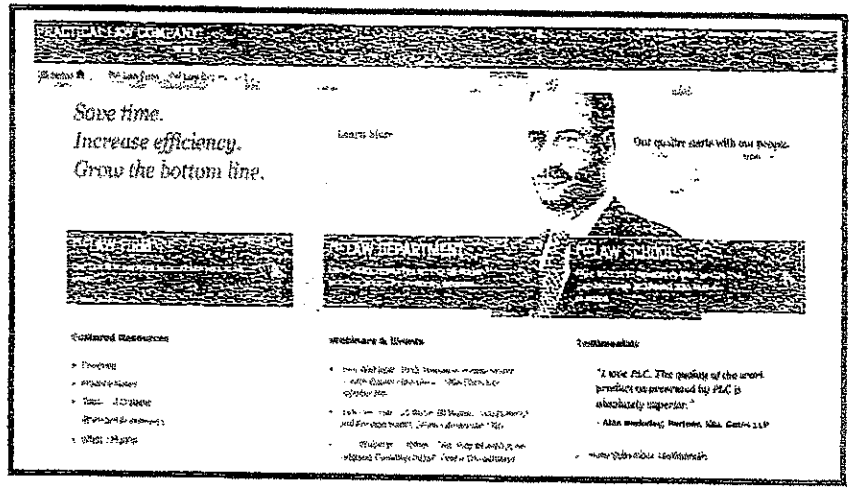
LegalShield.



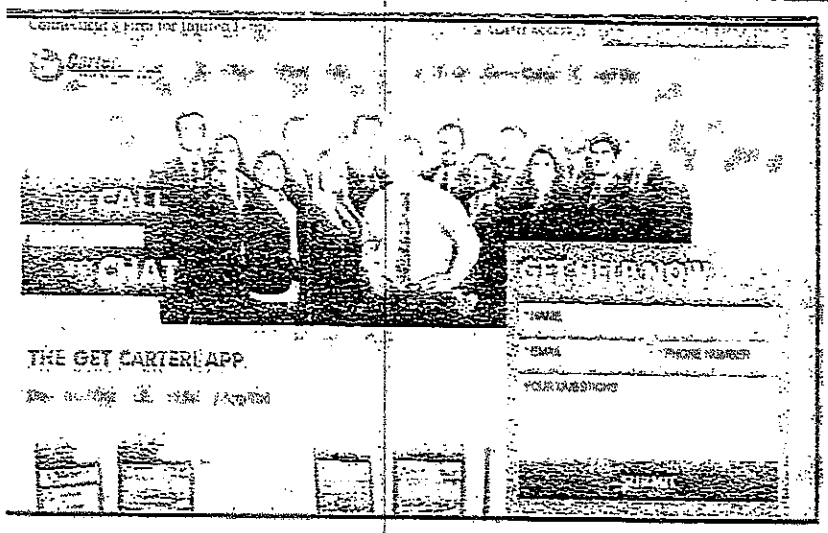
Novuslaw.



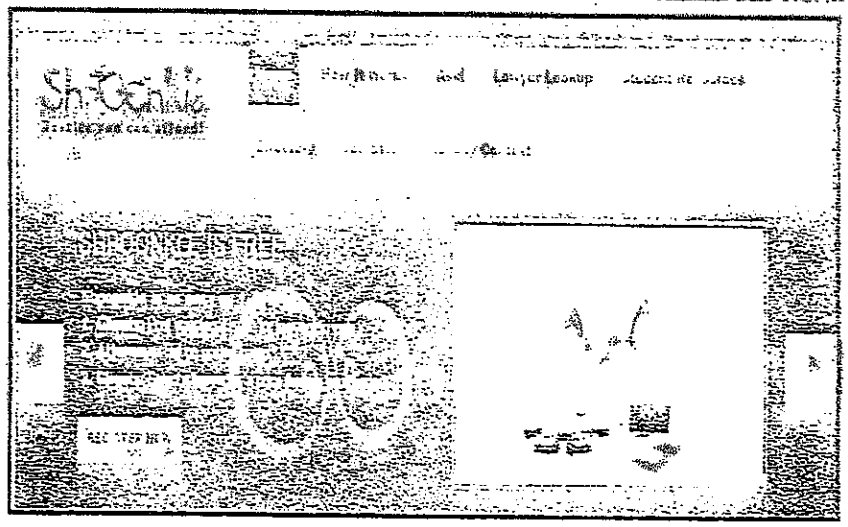
Practical Law Company.



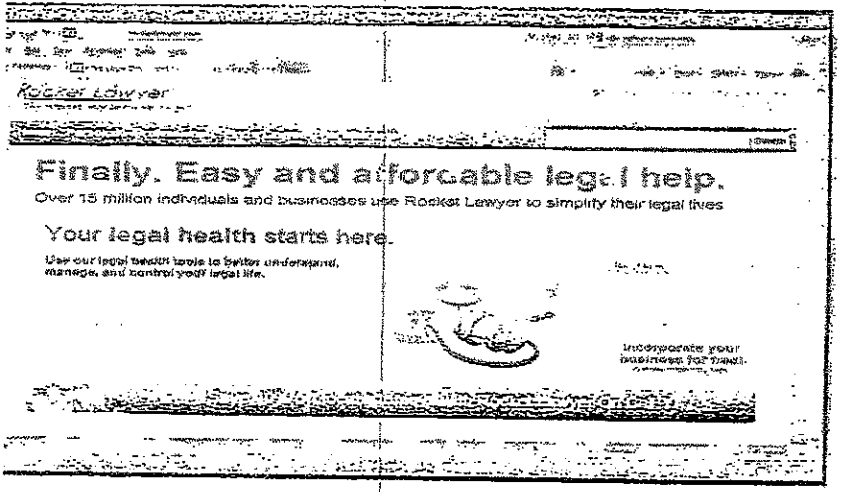
Law firm apps.



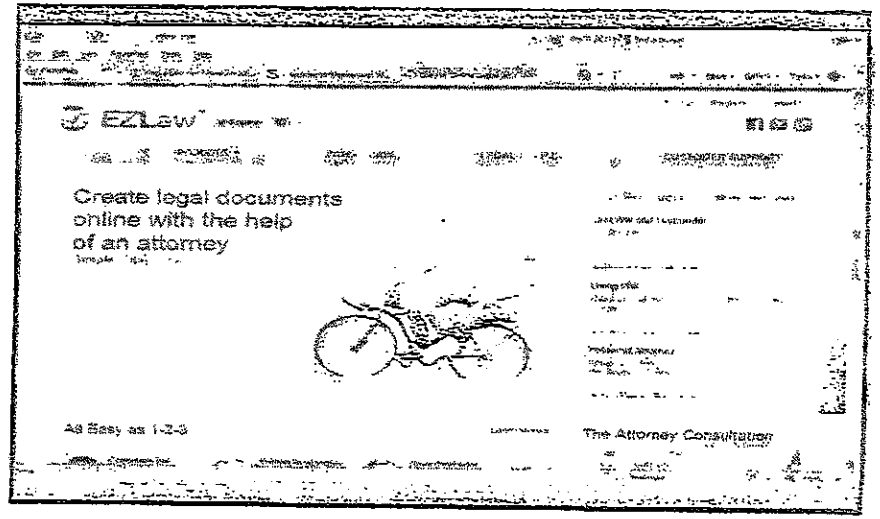
Shpoonkle-eBay for legal services?



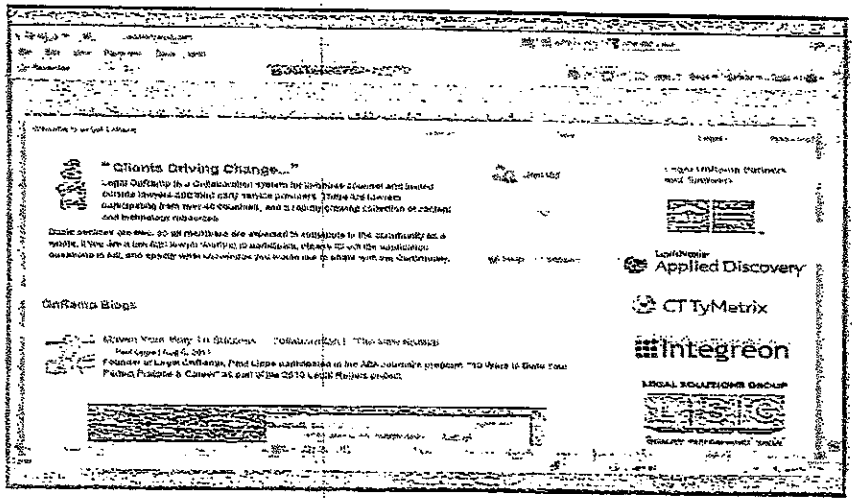
Rocket lawyer.



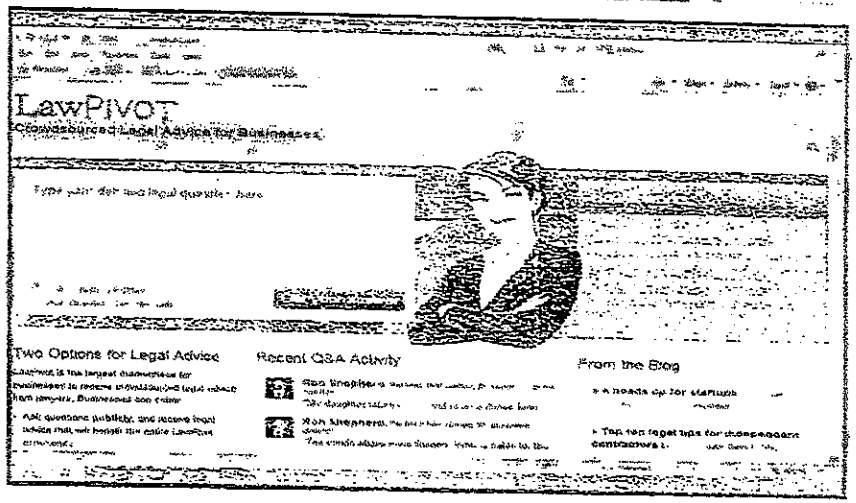
EZLaw.



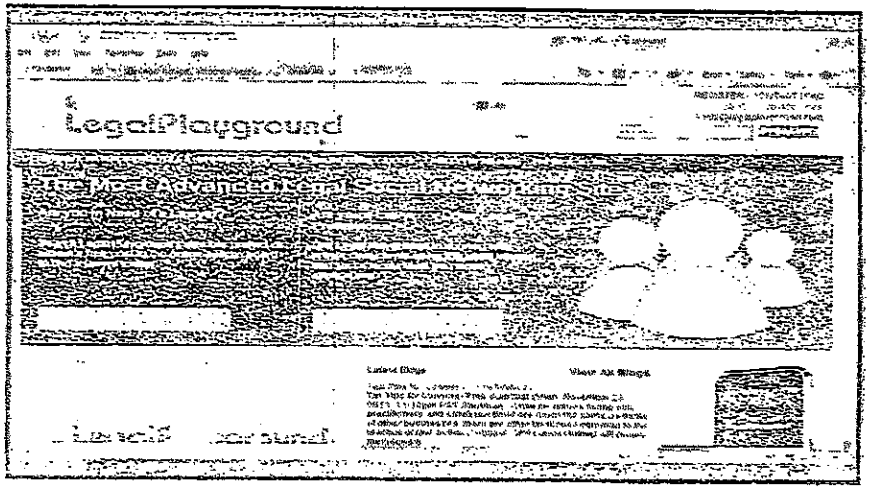
Legal OnRamp.



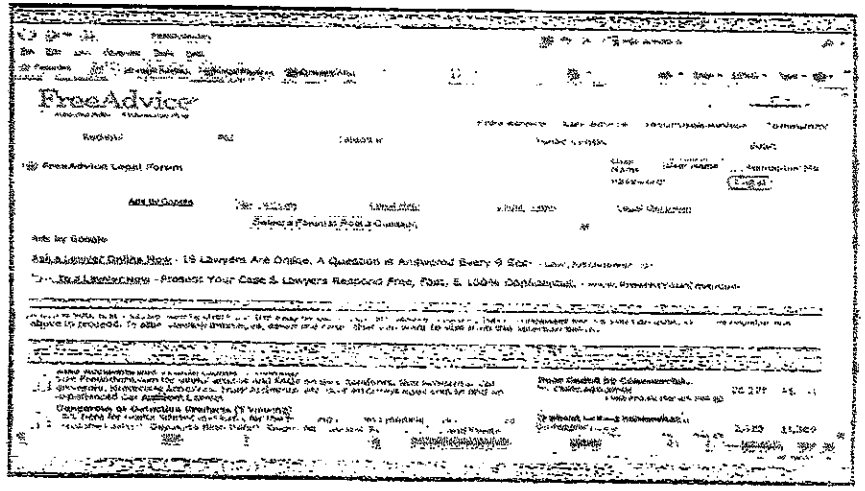
LawPivot.



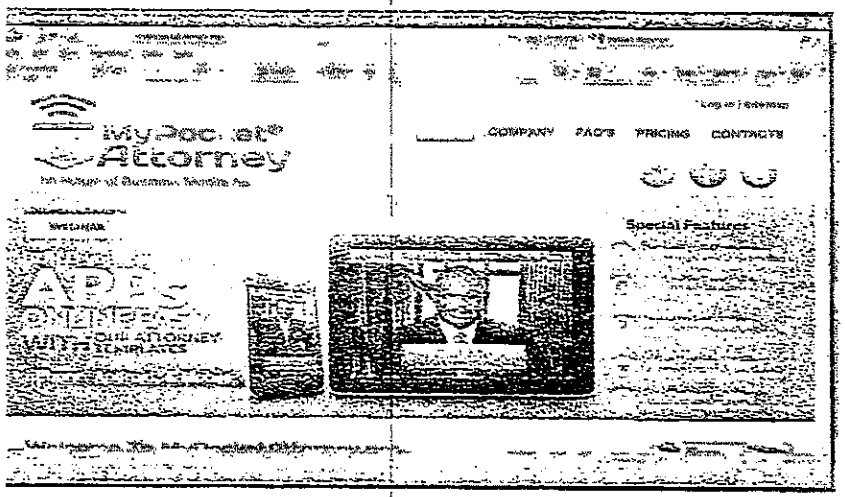
LegalPlayground.



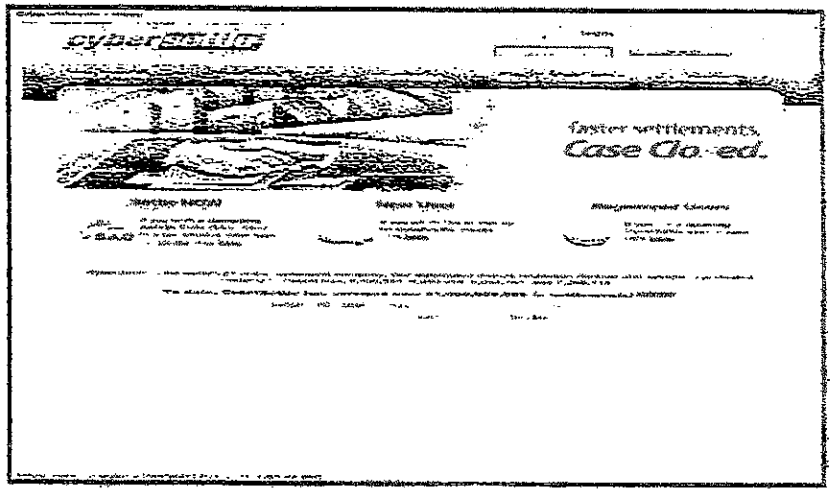
FreeAdvice.



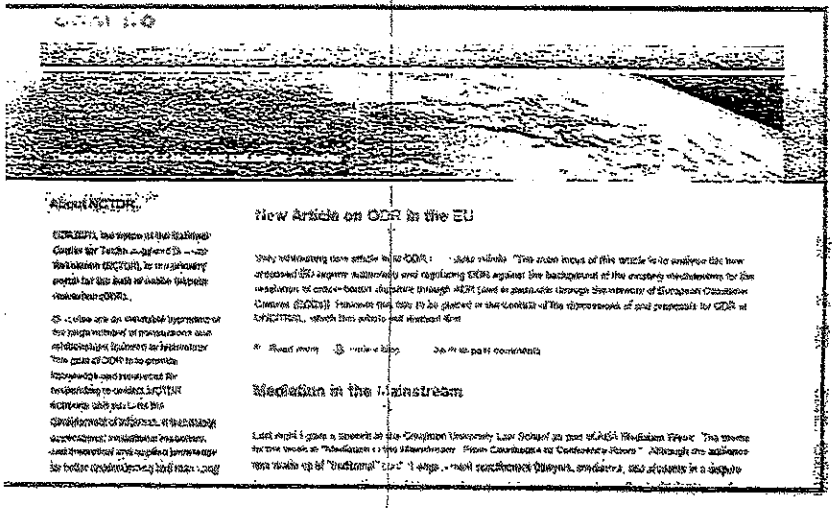
MyPocketAttorney.



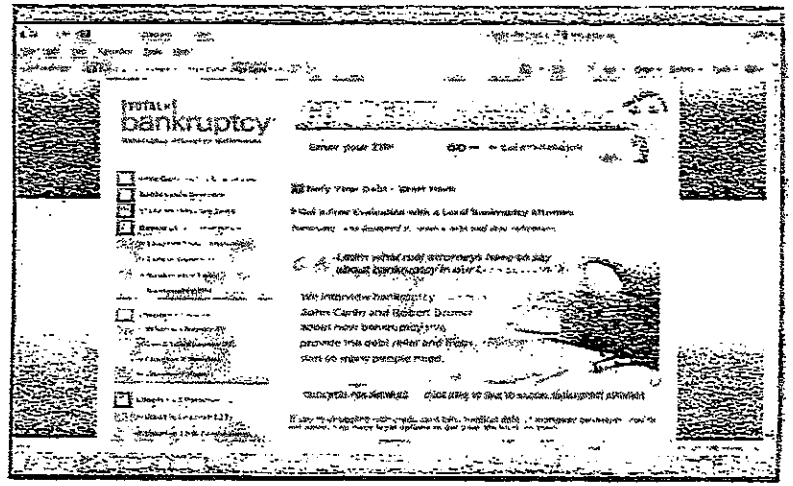
Cybersettle.com



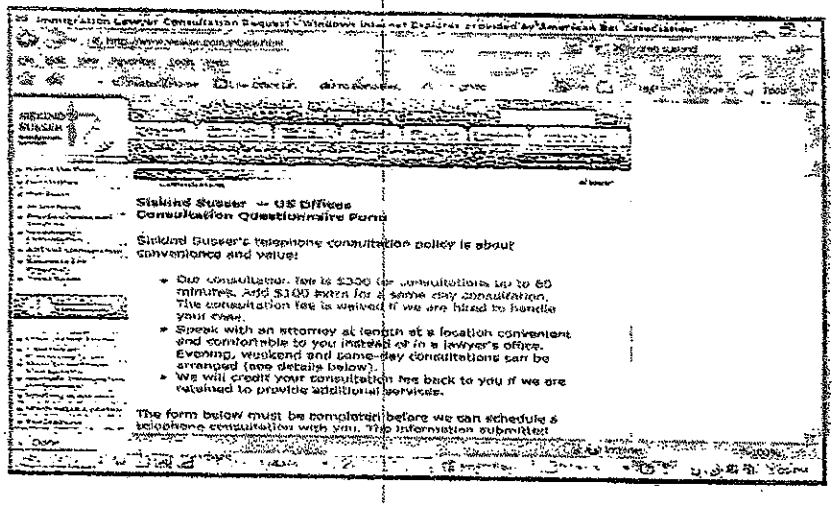
ODR.info



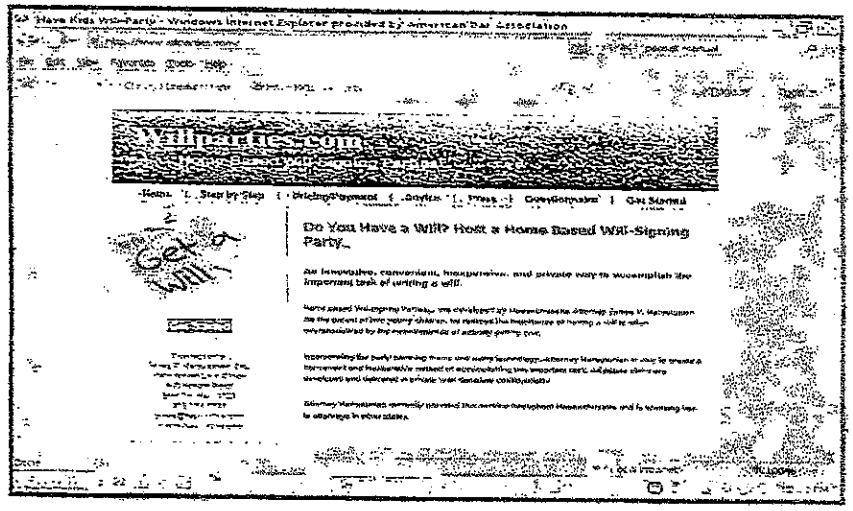
Total Bankruptcy.com



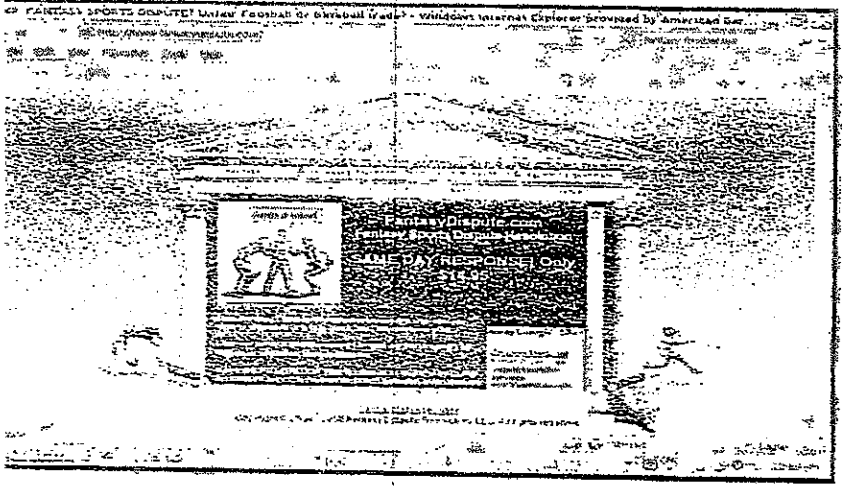
Immigration law portal.



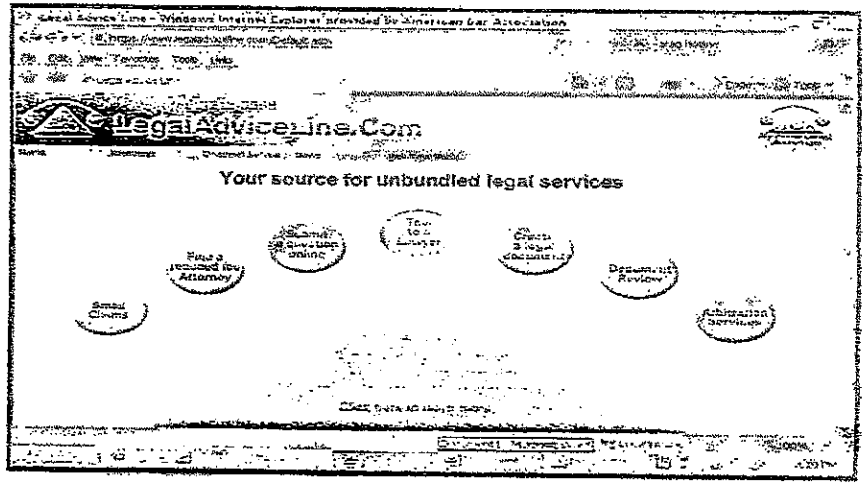
Will signing parties.



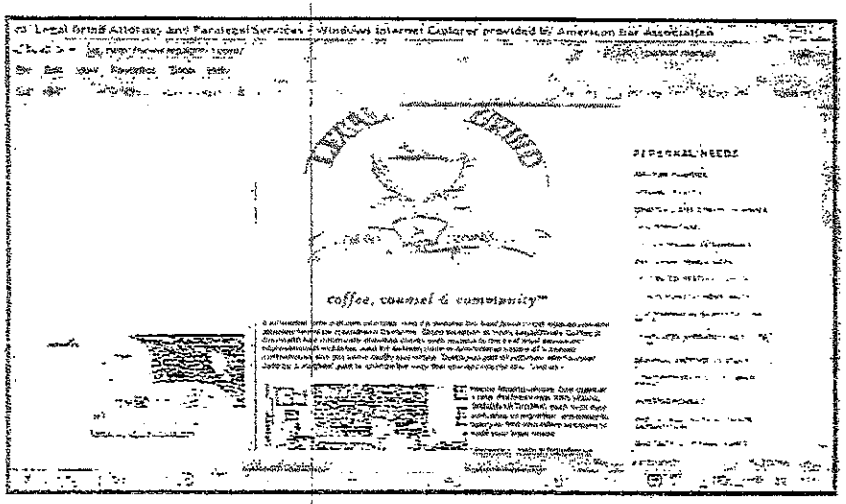
Fantasy sports dispute resolutions.



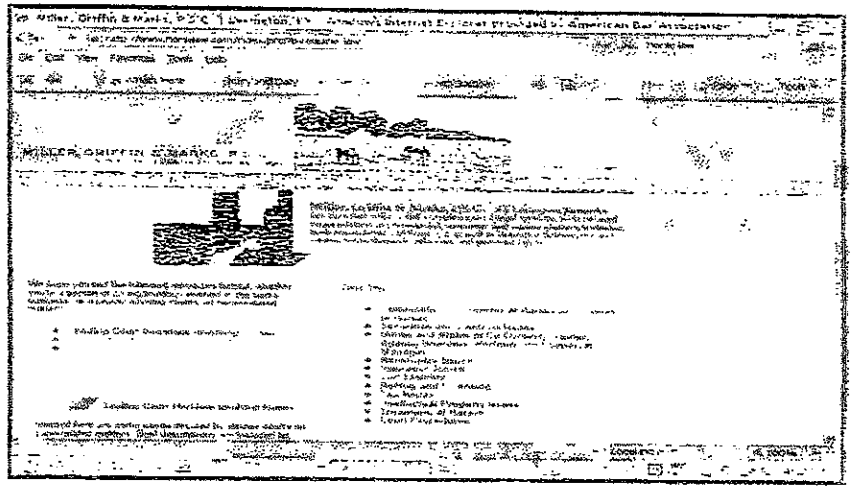
Unbundled legal services.



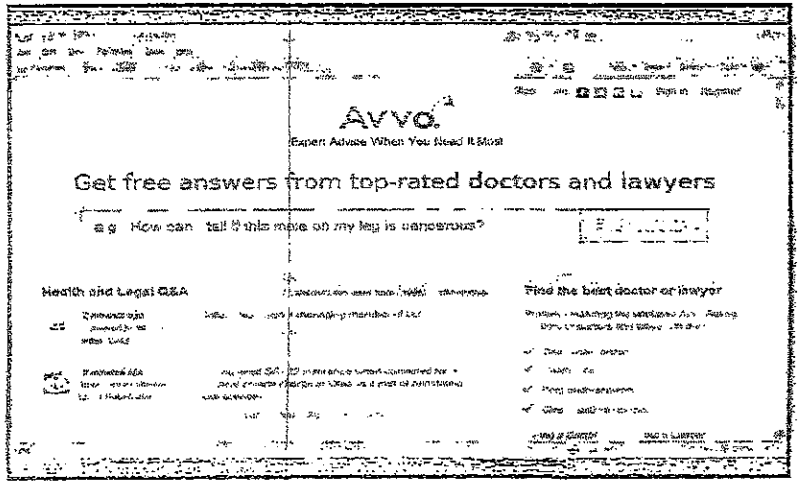
Legal grind.



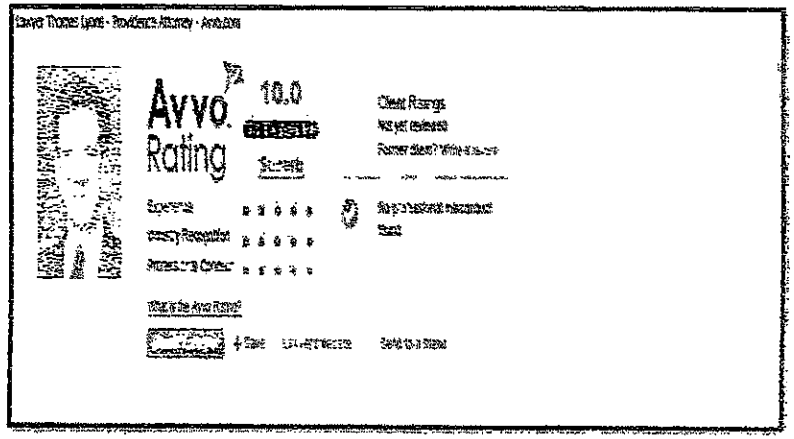
Equine law.



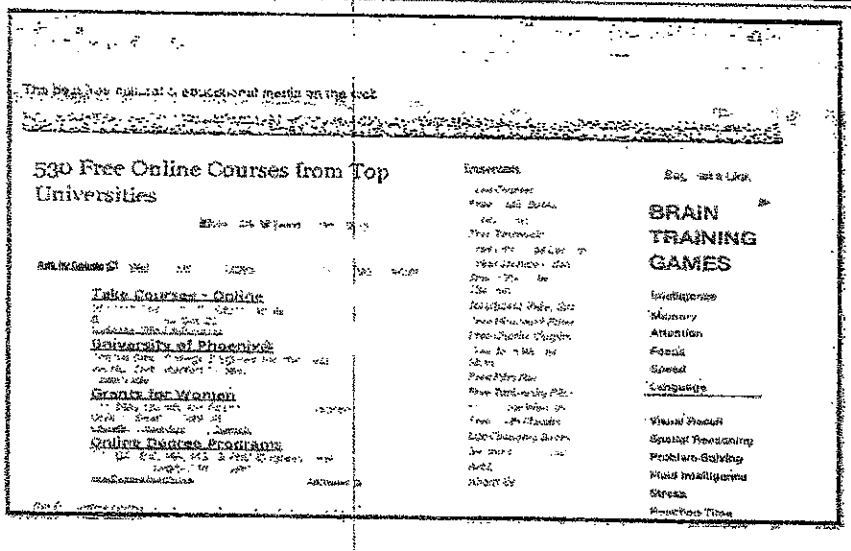
Avvo.com



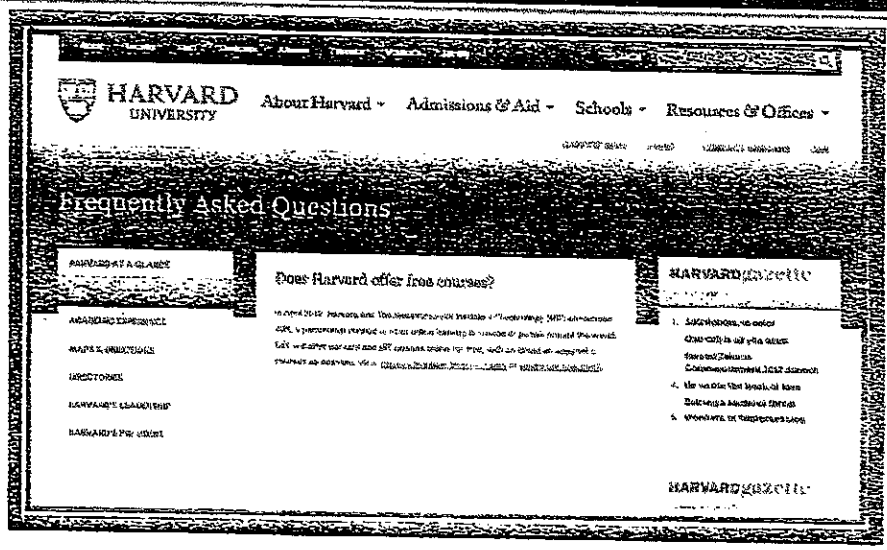
Avvo.com



Free online courses.



Harvard and MIT: EdX



Thoughts for leaders.

- If you're not on the train, you might be on the tracks."
- We need to get our heads out of the sand.
- We need to think what the profession, bar association will be like in 5-10 years.
- Focus on "value added" work; avoid "commodity" work.
- How can you make technology work for you and your clients?
- Need to generate work by creating work.

More food for thought.

- Market legal products on the internet to make money while you sleep...Richard Granat.
- Update your website and make it interactive.
  Write a blog.
  Drive potential clients to your website.
  Provide unbundled legal services.
  Niche practices.
- Form collaborative networks and virtual law firms for one case or a particular area of practice.
- Examine your practice areas and discontinue those that have no future.
- Case management business.

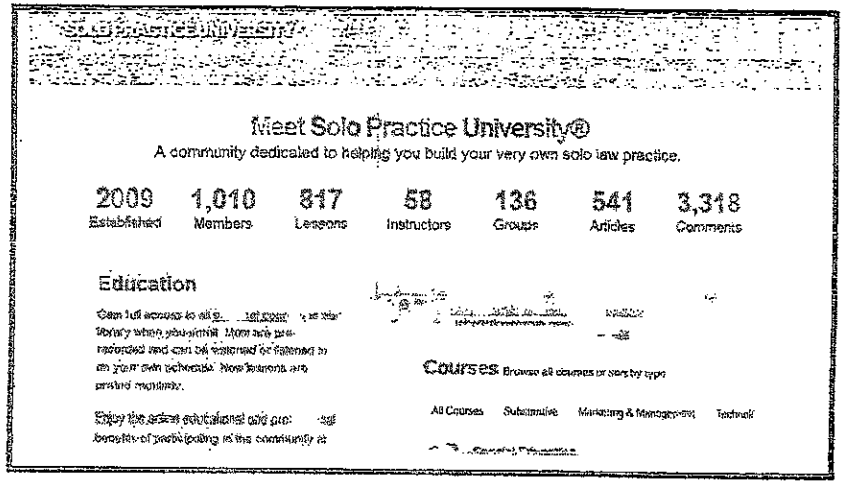
More structural changes.

- Unbundled legal services
- Combine the internet model along with value added services.
- New attorneys, Bar associations and Law schools combine resources to provide training and legal services.
- Nationwide bar exam.
- Alternative business structures.
  No restrictions on practicing in various states.

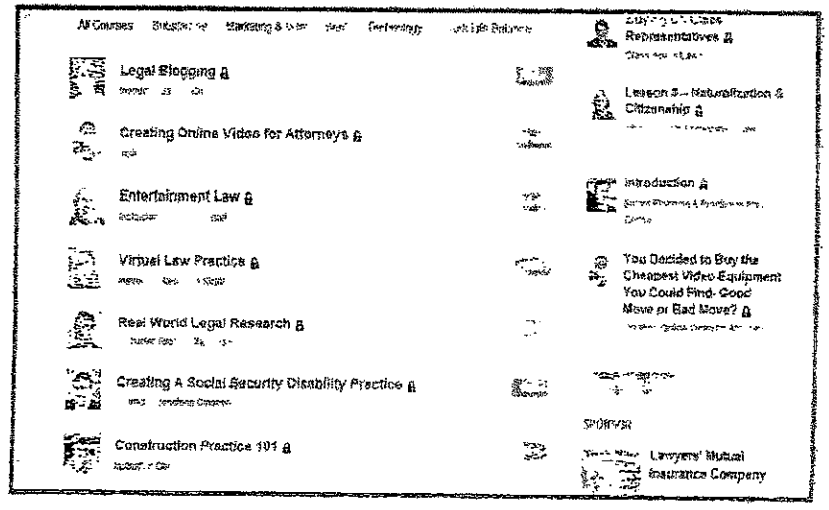
Information sharing and CLE.

- Utilize the ABA resources for free information.
  Center for professional responsibility.
- Ethics 20/20 information.
- ABA Bar Services.
- Should CLE be free?
  On line competition from free providers.

Solo practice University.



Solo University courses.



GENERATING NEW BUSINESS TODAY & IN THE FUTURE:

ADVICE FROM A LEGAL MARKETING PRO

(ALL OF THIS IS FREE FROM HIS WEBSITE)

TheRemsenGroup

We've worked exclusively with law firms for over fifteen years.
–JOHN REMSEN, JR.

JOHN REMSEN, JR. IS ONE OF THE NATION'S MOST RECOGNIZED AUTHORITIES IN THE FIELD OF LAW FIRM MARKETING. →

About Us
Biographical Profile
Client Commitment
Speaking Engagements
Press Releases
John's Video
print

About Us

After more than a decade of work as in-house marketing director with two major law firms, John Remsen, Jr. founded TheRemsenGroup in 1997 to bring effective and cost-efficient marketing and business development programs to commercial law firms of all types and sizes. Based in Atlanta, we work mostly with mid-size, commercial firms, tailoring our programs and recommendations to their unique requirements.

Although we assist clients with a full range of marketing and business concerns, we focus our consulting services in three primary areas:

Firm-wide Marketing Plans
We have worked with many firms of all sizes to help them develop and implement their first firm-wide marketing plans. And we have worked with many others to help them refine and enhance their current marketing efforts.

Firm Retreats
Firm Retreats are one of the things we do best. You can hire us to present a variety of topics on marketing and business development (most are CLE-approved) or you can hire us to arrange the entire affair. Either way, we can help you stage the best retreat your firm has ever had.

Marketing Staff
Over the last three years, we have successfully recruited marketing staff for numerous law firms. In some cases, they want to hire their first marketing director. In other situations, they want to upgrade the position. If your firm has 30 lawyers or more, it's time to consider hiring an in-house marketing professional.

Of course, there are many other services we offer in addition to those described above.

Contact Us today for more information about how TheRemsenGroup can help your law firm implement powerful and dignified marketing programs that work.

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Search

TheRemsenGroup

Every law firm should have these books and newsletters in its library.
—JOHN REMSEN, JR.

JOHN REMSEN, JR. IS ONE OF THE NATION'S MOST RECOGNIZED AUTHORITIES IN THE FIELD OF LAW FIRM MARKETING. →

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Resources
Marketing Tips
Articles & White Papers
Reader Surveys
Bylined Articles
Books & Newsletters
The Little Black Book
print

Recommended Reading: Books & Newsletters

Much has been written in recent years on law firm marketing and business development. Here are some of the best resources available to lawyers and law firms.

BOOKS

The Little Black Book on Law Firm Branding and Positioning
Author: Paula Black
Price: $29.99. Click here to order.

Business Development for Lawyers:
Strategies for Getting and Keeping Clients
Author: Sally J. Schmidt
Price: $49.95. Click here to order.

The Lawyer's Field Guide to Effective Business Development
Author: William J. Flannery, Jr.
Price: $59.95. Click here to oder.

The Essential Little Book of Great Lawyering
Author: James A. Durham
Price: $11.95. Click here to order.

Managing the Professional Services Firm,
True Professionalism, and
Trusted Advisor
Author: David H. Maister
Price: $14-24 in most bookstores, $10.20-17.50 at Amazon.com

Marketing the Law Firm: Business Development Techniques
Author: Sally J. Schmidt
Price: $195 at (800) 888-8300

Good to Great: Why Some Companies Make the Leap...and Others Don't
Author: Jim Collins
Price: $18.50 at Amazon.com

Selling the Invisible
Author: Harry Beckwith
Price: $21.95 in most bookstores, $14.93 at Amazon.com

Aligning the Stars: Organizing Professionals to Win
Author: Jay W. Lorsch, Thomas J. Tierney
Price: $29.95 in most bookstores, $19.77 at Amazon.com

Spin Selling
Author: Neil Rackham
Price: $29 in most bookstores, $29.95 at Amazon.com

The Knowing-Doing Gap: How Smart Companies Turn Knowledge into Action
Author: Jeffrey Pfeffer, Robert I. Sutton
Price: $24 in most bookstores, $19.77 at Amazon.com

Rain-Making: The Professional's Guide to Attract New Clients
Author: Ford Harding
Price: $12.95 in most bookstores, $10.17 at Amazon.com

Guerilla Marketing Attack for Attorneys
Author: Jay Conrad Levinson
Price: $29.95 available in most bookstores

Leading Change
Author: John P. Kotter
Price: $24.95 in most bookstores, $16.47 at Amazon.com

Managing Partner 101: A Guide to Successful Law Firm Leadership
Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again

Compensation Plans for Law Firms
Making Partner: A Guide for Law Firm Associates
ABA Guide to Legal Marketing
Marketing Success Stories
ABA Guide to Preparing a Marketing Plan
Effective Marketing of Legal Services
Action Steps to Marketing Success
The Complete Guide to Marketing Your Law Practice
Women Rainmakers' 101+ Best Marketing Tips
(and many more)
Various Authors
Published by the American Bar Association's Law Practice Management Section
Price: up to $129 at (312) 988-5522

NEWSLETTERS

Marketing for Lawyers
Editor: Sam Adler
Publisher: Leader Publications
Price: $225/year (12 issues)
(800) 888-8300

Law Office Management & Administration Report (LOMAR)
Editor: Lisa Isom-Rodriguez
Publisher: Institute of Management & Administration
Price: $295/year (12 issues)
(212) 244-0360

Of Counsel
Editor: Larry Smith
Publisher: Aspen Law & Business
Price: $445/year (12 issues)
(800) 223-0231

Marketing the Law Firm
Publisher: Law Journal Newsletters
Price: $279/year (12 issues)

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Resources

Marketing Tips

Articles & White Papers

Reader Surveys

Bylined Articles

Books & Newsletters

The Little Black Book

print

Marketing Tips of the Month

Here is an archive of Marketing Tips of the Month that have previously appeared in *The Remsen Report*, our monthly electronic newsletter.

The Ten Golden Rules to Make Your New Client Happy
By John Remsen, Jr.

Top Ten Marketing Tips
for Mid-Level (Three to Five Year) Associates
By John Remsen, Jr.

Top Ten Marketing Tips
for First and Second Year Associates
By John Remsen, Jr.

Dealing with the Media in a High Profile Case
By Susan Maynor and John Remsen, Jr.

Eight Important Reminders From General Counsel
By John Remsen, Jr.

You Just Gotta Go
By John Remsen, Jr.

Your Guide to Developing Your Personal Marketing Plan
By John Remsen, Jr.

Lawyers Should Look Like Lawyers: Part II
A Strong and Vocal Reaction from Managing Partners
By John Remsen, Jr.

Enough is Enough: Lawyers Should Look Like Lawyers!
By John Remsen, Jr.

Leading Productive Meetings
By Sally Williamson

Scoring Big Points on the Telephone
By John Remsen, Jr.

Finding Your Best Role in the Law Firm
By Matt Sherman and John Remsen, Jr.

Seven Habits of Successful Rainmakers
By Sara Holtz

Top 100 Tips for Working the Room
By Jeffrey M. Horn

Converting Prospects into Clients: The Art of Building Trust
By Mike O'Horo

The Best Way to Catch New Clients? Find Their Associations and Get Actively Involved
By John Remsen, Jr.

Ten Marketing Tips for the Holidays
By John Remsen, Jr.

How to Improve the Effectiveness of Writing Articles
By John Remsen, Jr.

How to Improve the Effectiveness of Your Public Speaking Opportunities
By John Remsen, Jr.

New Approaches to Expanding Your Practice in a Competitive Marketplace
By Don Silver

Client Site Visits
By John Remsen, Jr.

Your Individual Attorney Marketing Plan
By John Remsen, Jr.

TheRemsenGroup

Smart Marketing for the Forward Thinking Law Firm

Your Guide to Developing Your Personal Marketing Plan ...and Why Every Lawyer Should Have One

by John Remsen, Jr.

In my humble opinion, every lawyer in private practice --- regardless of how many years practicing law -- should have a Personal Marketing Plan. Here's why:

You Will Seize Control of Your Career
Creating and implementing your Personal Marketing Plan enables you to seize control of your career. In time, it puts you in a position to attract and retain clients you enjoy, and matters you find challenging and interesting. You will also be less dependent on others to feed you. There are two kinds of lawyers in private practice: lawyers with clients, and lawyers who work for lawyers with clients. Which would you rather be?

You Will Make More Money
Rainmakers make more money -- *often a whole lot more money* -- than non-rainmakers in just about every law firm in the U.S. Chances are you've heard the terms "finders, minders and grinders." Trust me; the action is with the finders.

You Will Have More Clout in the Firm
Lawyers who bring in business also have more power within their firms. Over time, they emerge as firm leaders, influencing important decisions about the firm, its policies and procedures, and its future direction.

How Much Time Should You Invest?
Of course, *implementing* your plan is the key to success....and it takes time. Non-billable time. I recommend that Partners invest 200 hours a year, and 100 hours a year for Associates. It's critical you do a little bit every day. Fifteen minutes here. A half-hour there. Effective marketing and business development is not a "start-stop" process. It's like an exercise regimen...results come with consistency over time.

What Types of Things Should You Do?
Partners should visit top clients at the clients' places of business each year. (Refer to my previous Marketing Tip about Client Site Visits.) Associates should focus first on honing their legal skills and "credentialing" activities. For all attorneys, lunch once a week with a client, prospective client or referral source is a good habit. Joining and being actively involved in a well-chosen organization is another good thing to do. (Refer to my previous Marketing Tip about Individual Marketing Plans.) Article writing and speech giving are good activities, as well.

Make the Commitment to Yourself
Of course, developing and implementing your Personal Marketing Plan requires non-billable time. And, herein lies the dilemma for many lawyers. Non-billable "marketing time" is not rewarded -- and sometimes not even measured -- in many law firms. No matter, you should invest the time anyway. In his book *True Professionalism*, David Maister states that billable hours are for today's income, but what you do with your non-billable time determines your future. I couldn't agree more.

Just Do It!
The following pages set forth our outline for an effective, well-focused Individual Attorney Marketing Plan. Before the New Year begins, I suggest that you take the time to review this outline, develop your Personal Marketing Plan, and commit to its implementation in 2008.

Happy marketing!

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TheRemsenGroup

Smart Marketing for the Forward-Thinking Law Firm

INDIVIDUAL ATTORNEY MARKETING PLAN

NAME OF ATTORNEY: _____

AREA(S) OF PRACTICE:
(the fewer, the better) _____

TARGET AUDIENCE(S):
(the fewer, the better) _____

YOUR TOP FIVE CLIENTS

List below your top five clients over the next 12 months. They need not be the biggest in terms of current revenue, but they provide lucrative, desirable legal work and there is strong potential for much more.

Client Name	Description of Matter(s)	Estimated Fees Over Next 12 Months
1)		
2)		
3)		
4)		
5)		

YOUR "A" LIST

Next, list below ***at least*** 15 key contacts with whom you will proactively build and enhance your relationships over the next 12 months. These contacts should include existing clients, prospective clients and/or referral sources.

Recommended relationship building activities include Client Site Visits (for clients and referral sources), ongoing personal contact, hand-written notes, regular meeting dates, invitations to Firm-sponsored seminars, entertainment, holiday card/gift, add contact to Firm's mailing list, etc.

YOUR "A" LIST (Cont'd)

Name	Company	Relationship Building Activities
1)		
2)		
3)		
4)		
5)		
6)		
7)		
8)		
9)		
10)		
11)		
12)		
13)		
14)		
15)		

Activity Codes: G= Golf, FG= Football Game, BG= Baseball Game, L/D= Regular Lunch/Dinner, ~~CSV= Client Site Visit, HP= Holiday Party, etc.~~

ORGANIZATIONAL INVOLVEMENT

List below the organizations to which you belong, your current level of involvement and your goals during the next 12 months.

Bar Associations (List organizations by name)	**Current Involvement**	**Goals for Next 12 Months**

Industry Associations / Other Organizations

SPEECHES AND SEMINARS

List below any speeches you intend to present, or seminars at which you will speak during the next 12 months.

Organization	**Topic**	**Date**

BY-LINED ARTICLES

List below any by-lined articles you intend to write during the next 12 months.

Publication	**Topic**	**Date**

OTHER CONTRIBUTIONS TO FIRM'S MARKETING GOALS AND OBJECTIVES

Please list below any additional contributions you intend to make to the Firm's marketing program over the next 12 months.

YOUR STRENGTHS AS A MARKETER

Finally, please rate what you think your strengths are as a marketer on a 1-10 scale with 10 as the highest score.

	Poor									Excellent
One-on-One Interaction	1	2	3	4	5	6	7	8	9	10
Organizational Involvement	1	2	3	4	5	6	7	8	9	10
Personal Networking	1	2	3	4	5	6	7	8	9	10
Public Speaking	1	2	3	4	5	6	7	8	9	10
Writing Articles	1	2	3	4	5	6	7	8	9	10
Organizing an Event	1	2	3	4	5	6	7	8	9	10
Other (please specify _____)	1	2	3	4	5	6	7	8	9	10

TIME COMMITMENT

Please indicate the total number of hours you intend to devote to marketing and business development activities over the next 12 months.

_____ hours

BUDGET REQUESTED

Please indicate the dollars you are requesting for marketing and business development activities over the next 12 months.

$ _____

SIGNATURE: _____

DATE: _____

GENERATING NEW BUSINESS TODAY & IN THE FUTURE:

ADDITIONAL MATERIALS

Solo Network

50 Ways to Market Your Practice

Tip-top tips from successful solos and small-firm practitioners

Posted Oct 1, 2007 1:12 PM CDT
By Margaret Graham Tebo

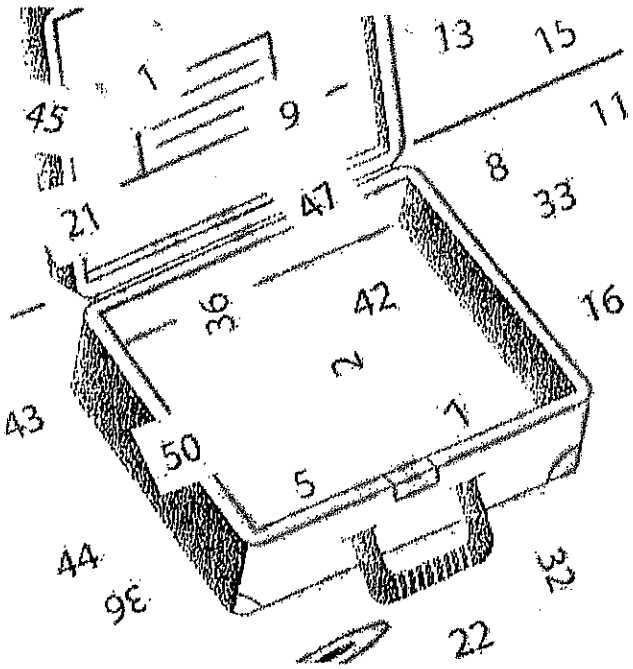


Illustration by Harry Campbell

There's an adage that the best person to ask for advice is someone who has already done what you're trying to do. So who better to tell solo and small-firm lawyers about successful marketing techniques than those running successful practices?

Here are 50 tips compiled by attorney Terry Berger of Westminster, Md. Many came from the ABA's Solosez discussion group, which boasts more than 2,000 solo and small-firm lawyers as members.

1. Join your local chamber of commerce. It's great for networking and community credibility.

2. Get a unique business card and hand it out freely.

3. Give a client or other nonlawyer contact at least two cards—one to keep and another to give away.

4. Give every employee his or her own business cards with name, title and e-mail address, along with the name of the law firm. People are more likely to hand out cards with their own names on them.

5. Offer to write an article for your local paper on a topic such as why everyone should have a will or questions to ask a contractor. Make sure the byline includes the name of your firm and, if possible, your e-mail address.

6. Add a signature block to your outgoing e-mail that includes your name, firm name (or simply attorney at law) city, state and phone number.

7. Try to get a local reporter to use you as a legal expert. Send an e-mail offering commentary on a court case. Learn to translate legalese into English and reporters will love you.

8. Join e-mail discussion lists at the local and state bar level, as well as the ABA's Solosez group. (You don't need to be an ABA member to join Solosez.)

9. Apply to teach at a local community college, community center or similar venue. This could be a for-credit course or a one-day course on your area of legal expertise.

10. Make sure everyone in your office building knows who you are, that you're a lawyer and what type of law you practice.

11. Send holiday cards to everyone you meet and keep the list growing. Also, send them early. If your clients get cards on Dec. 23, they may throw them away Dec. 26. If they get them early, the cards may sit out on the mantel for weeks.

12. Send birthday and anniversary cards to colleagues and clients. A simple calendar system and a box of generic cards makes this task easy.

13. Send personalized calendars each new year. Many Web sites will add your information to standard calendars at a low price. Try the long, thin calendars that are designed to stick to the top or bottom frame of a computer monitor.

14. Ask your clients to refer others to you. At the conclusion of the client's case, when they express gratitude, hand them some cards and tell them you hope they'll send their friends to you.

15. Offer to speak to community groups or at senior centers on topics such as wills, fraud avoidance and similar issues.

16. Register with your local bar association speaker's bureau. If your bar doesn't have one, offer to help start one.

17. Make sure everyone at your church or synagogue knows that you are an attorney and has your business card.

18. Advertise in school and church newsletters and local marketer newspapers. This sort of advertising is usually cost-efficient and such publications are surprisingly well-read by their target audiences.

19. Post your business card on the bulletin board at your barbershop, beauty salon, grocery store, community center and house of worship.

20. Send a copy of a recent case or legal news clip to another professional, attaching your card and a note such as, "I thought this might be of interest." Make a commitment to send at least two each week.

21. Send a congratulatory note to other local businesspeople in the news.

22. Donate last year's Martindale-Hubbell Law Directory or other slightly outdated law books to your local library with a bookplate bearing your name and firm name.

23. Donate magazines to your local jail, nursing home or school and hand over your business card when you drop them off.

24. Volunteer to speak at your local high school about law-related topics. Not only might the students become clients, but their teachers and parents just might, too.

25. Actively participate in community affairs.

26. Give business cards to waitstaff at your favorite restaurant and other service people you see regularly. Ask them to offer the cards to other customers who seem to need a lawyer.

27. Have lunch or dinner frequently with attorneys who practice in other areas and be sure you have plenty of each other's cards for referrals.

28. Cross-sell. When you complete work for clients, remind them that you handle other matters as well. Make sure they know that you would like the opportunity to serve them—or their friends, relatives, etc.—by drafting wills, handling personal injury matters or reviewing contracts.

29. Ask your clients to allow you to be their first contact for any legal issue they may encounter. Let them know that if you can't handle the matter, you know someone who can.

30. Get to know your client's business. If appropriate, visit your client's business. Showing interest reminds clients that their success is your success.

31. Tell clients what services you provide. Provide clients with all the necessary information about the firm so they can be better referral sources.

32. Send out press releases. Small local newspapers are especially interested.

33. Remind clients of obligations, such as lease renewal dates, business name registration dates and other important dates.

34. Send congratulations to clients for any life event, such as the birth of a child or a graduation.

35. Come up with new ideas for clients or their businesses. Even if the ideas are not acted on, it shows clients you are thinking of them and that you are creative.

36. Every Monday morning (or Sunday night) write down five marketing activities that you will accomplish during the week.

37. Make certain everyone in your firm and your family knows what type of law you practice and what type of clients you are seeking. Share information about case successes with staff.

38. Write down a 30-second description of your practice and commit it to memory. This is called the elevator speech. Use it whenever someone asks, "What type of law do you practice?" Everyone in the firm should have a copy of the description.

39. List five to 10 people or businesses you would like to have as clients. Devise a plan to get their attention.

40. List your 10 best clients or your 10 newest clients. Ask each why they came to your firm. This will allow you to determine which of your current marketing efforts are successful. Increase those efforts.

41. Never participate in any activity simply to get business. Always participate in an activity you enjoy or have interest in. If you are not interested in the group, you will not give your best effort and you will not benefit.

42. Network, network, network. Remember this is a never-ending process. It takes a long time to develop and benefit from contacts.

43. Never apologize for the size of your firm. This is especially important for solos and small-firm practitioners. There are good reasons for clients to use a solo or small-firm lawyer. Know what these reasons are, and let your clients and potential clients know. Always stress your strengths.

44 If there is more than one attorney in your firm, learn to cross-sell services to other clients. Clients often are not even aware of all the services provided. Brainstorm with your colleagues about how to better serve your clients.

45. Seek out free listings in directories—printed and online.

46. Write an e-mail newsletter about your practice area and send it to other lawyers. Archive the newsletters online.

47. Join the local trial lawyers association, even if you don't do much trial work. It's a good place to network and get name recognition from other lawyers.

48. Give out laminated "What to do after an accident" or "What to do if you're arrested" cards with your firm's information.

49. Give out durable key chains or pens—items that people use frequently—with your firm information printed on them.

50. Give vinyl or nylon briefcases to clients at their first visit. This will encourage clients to keep important papers for their case in one place and to bring everything to each office visit. Add a pen, key chain, pad of paper and some business cards to the case.

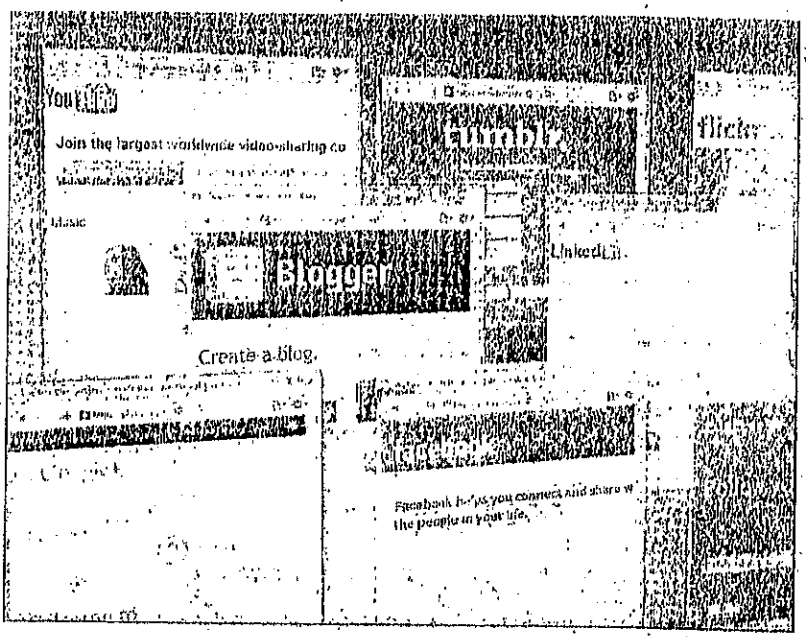
GENERATING NEW BUSINESS TODAY & IN THE FUTURE:

EFFECTIVELY UTILIZING TECHNOLOGY

Positives and pitfalls of social media marketing

PRACTICE MANAGEMENT

By Ed Poll



©iStockphoto.com

The use of social media — whether it includes blogging, a LinkedIn or Facebook page, a Twitter post, or any number of other new iterations — is perhaps the most effective, low-cost marketing channel for small and solo law firms today. However, it can also be a fragmented time-waster if not diligently applied and integrated.

Social media sites are "broadcasting" in the purest sense. They may reach a few potential clients, but they also reach many more people who don't have the slightest interest in a given lawyer or law firm. And the firm is paying for all those disengaged listeners, in terms of the time that consistent online marketing requires.

Thought leadership

At its most effective, social media used in this way can help you create a reputation as a "thought leader" in your practice area. Blogging or active Twitter feeds, in particular, will likely increase the number of calls you receive from reporters, who are extensive searchers of blogs and other social media tools for sources; and this frequently leads to an increase in the number of speaking invitations attorneys receive. It's all important for one reason: visibility.

Establishing an online reputation can lead you to write articles for local and national publications in your field; write a commercially published book (the gold standard of marketing success) for the equivalent of third-party endorsement (only someone important would appear in a commercial publisher's venue); speak at conferences; create telesemiars; create a video; do podcasts; refine and improve your website; and/or send out an electronic newsletter.

These are only a few of the communication channels a lawyer can use to create client relationships. Law firms and lawyers that use social media this way have better marketing through more web visitors, inbound links and indexed pages. The more your target market sees your name and knows who you are, the more likely they are to call you. And calls are the benchmark for marketing success.

Adequate return

Without measuring social media marketing efforts by the specific number of contacts made, clients added and billable time gained, a firm may not be getting an adequate return. Social media results are in fact measurable in certain ways — for example, a follower count on Twitter, the number of "likes" on a Facebook page or the range of connections made on LinkedIn. These measurements, however, merely indicate the opening of contact with potential clients.

Lead generation and new business secured from those leads are the only valid ways to determine whether social media marketing works. Attracting more followers and online connections is worthwhile only if they lead to in-person meetings. Online marketing has to produce new files and new revenue or it is not an effective business development tool.

Making frequent tweets or Facebook or blog posts and answering responses to them can definitely take time. Let's say it's just two hours per workweek. If we assume 50 workweeks per year for ease of calculation, and two hours per week and $200 per hour billable value for an attorney, the calculation is $20,000 of billable time. It's essential for that time to provide a return on investment, as defined by these measures:

- Do constant follow-up by responding to inquiries and incorporating posted material into articles, speeches, client updates and so on. If you are making the effort, make maximum marketing application of it beyond the social media itself.
- Incorporate social media into your daily professional routine. Occasional posts are simply not effective. Establishing a regular posting routine keeps you engaged with prospects and ensures that your content is fresh.
- Don't give away the store on a blog or Facebook page. The wisest course is to suggest your firm's knowledge and capabilities rather than to display detailed

Continued on page 24

A coach, syndicated columnist and speaker on topics relating to The Business of Law,® Edward Poll, J.D., M.B.A., CMC is a strategic law firm planner whose ideas have helped thousands of lawyers increase their revenue, improve their profitability and enhance their satisfaction with the practice of law. Contact Ed at (800) 837-5880 and see more at www.lawbiz.com and www.lawbizblog.com.

Positives and pitfalls of social media marketing

Continued from page 6

information and allow your followers to make full use of it.

Ethical caution

In social media marketing, attorneys must keep the rules of professional conduct in mind.

There are many concerns about whether social media activity is freely available information, or is advertising controlled by the Bar. The American Bar Association's Commission on Ethics 20/20 Working Group on the Implications of New Social Media recommended in 2011 that social networking should not be used for "real time electronic contact" to solicit clients and should be viewed as general communication to educate potential clients.

But "education" is in the eye of the beholder. As an example of what can happen, the Virginia State Bar in 2011 charged a lawyer with professional misconduct for talking about his own completed cases on his blog, claiming that it violated client confidentiality and disregarded ethics rules, which required an advertising disclaimer stating that results depend upon factors unique to each case.

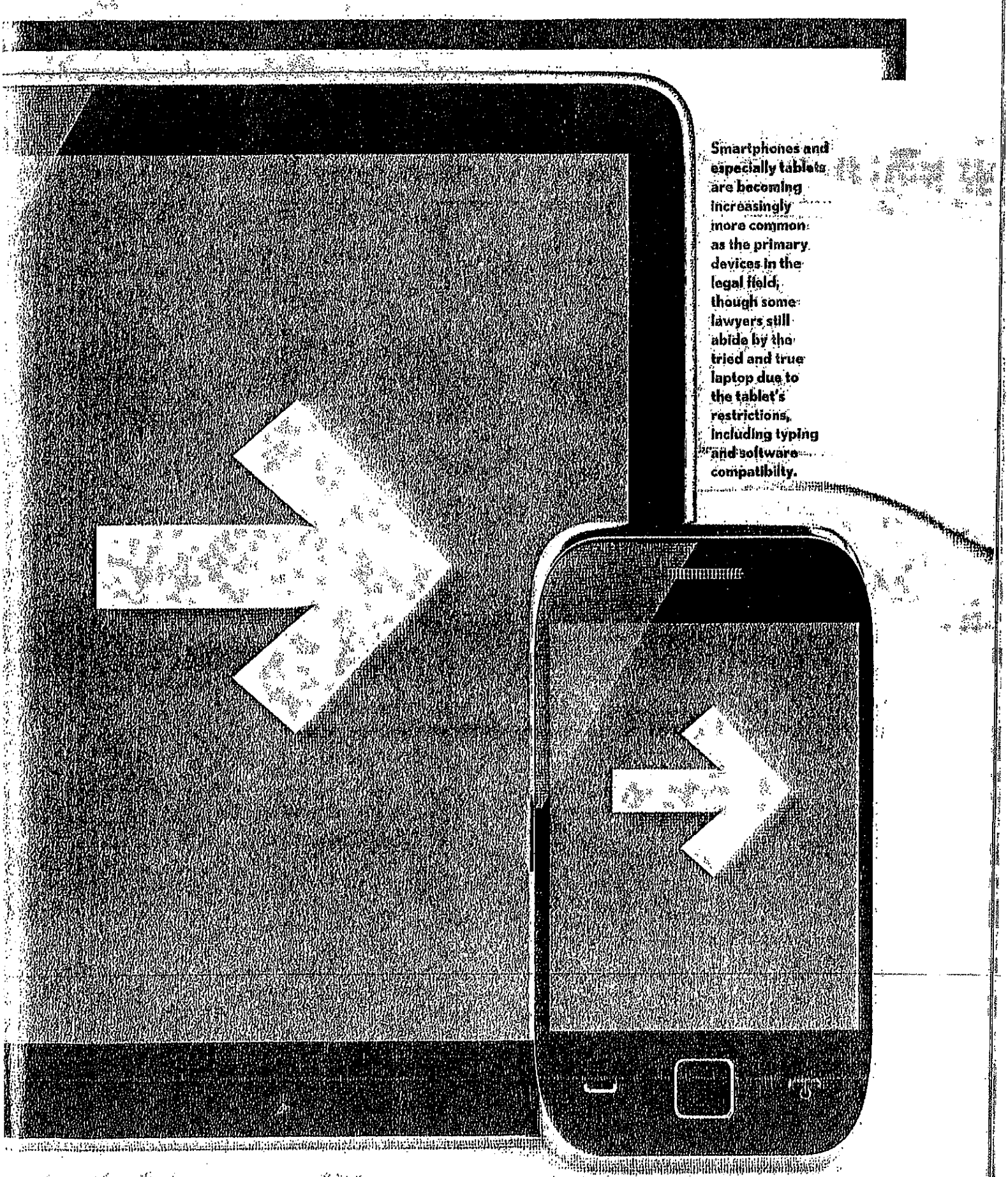
The lawyer argued that his blog had only personal commentary, that the information posted was disclosed during public trials, was accurate, did not violate any confidences — and was not advertising. The State Bar disagreed, the lawyer reluctantly posted the disclaimer, but he still sought vindication in the courts. He got it in 2012, when a three-judge panel ruled that the disclaimer was necessary but that a court decision on the public record was not confidential, so the lawyer could write about it.

This controversy raises a valid question about regulating lawyers' use of social media. It is one thing to regulate for truth and fairness in promotional statements, and to restrict hyperbole so as not to create false expectations. It is another thing to say how the communication can be framed. Bar associations seek to regulate lawyers in ways that other governing bodies do not attempt for such professionals as doctors and accountants. The losers are small firms and sole practitioners — and those clients who would benefit from learning about them through social media. As far as the ultimate concern of the client, as well as legal ethics, the quality of legal service and not the degree of salesmanship and promotion should be what is important. And that is what your social media communication should convey.

While the format has its skeptics, mobile apps are revolutionizing the way law is being practiced in the U.S.—a trend that will only intensify this year, according to ardent supporters.

Indeed, the latest smartphone or must-have tablet is no longer a technological fashion statement; it's a critical, competitive tool that many attorneys simply refuse to live without.

"Smartphones and tablets are not just shiny objects to catch up on the news or update Facebook," says Chad E. Burton, whose virtual law firm serves Ohio and North Carolina. They "can play a key role in producing work product for clients and managing a law firm."



Smartphones and especially tablets are becoming increasingly more common as the primary devices in the legal field, though some lawyers still abide by the tried and true laptop due to the tablet's restrictions, including typing and software compatibility.

ISTOCKPHOTO

"I can run our entire practice off my iPad," says Burton, whose headquarters is in Dayton, Ohio. "One example: You could Skype in a client or another lawyer to a deposition or hearing to let them observe what is going on—which naturally saves time and money."

Jeff Richardson, a New Orleans lawyer and author of the blog iPhone JD, would not think of hitting the legal trenches without GoodReader, which he calls "the most useful app on my iPad." It allows tablet, iPod Touch and iPhone users to read virtually any document—PDFs, books, maps, even pictures and movies.

And Jeff Taylor, an Oklahoma City lawyer and author of the Droid Lawyer blog, is similarly smitten with Fastcase, a legal research app that enables an attorney to pull up cases, statutes, court rules and other documents virtually anywhere on the planet using any Android device.

WHY SO POPULAR?

App fanatics cite all sorts of reasons why they believe mobile is the future of law computing, but the ability of apps to technologically arm an attorney on the go continues to be one of the format's greatest draws.

As Brett Burney of Burney Consultants in Beachwood, Ohio, says, "The fact that you can do so much work today on a small iPad that used to require a heavy, bulky laptop a few years ago is a tremendous leap forward in productivity."

Apps also have a reputation for appealing to an extremely specific need and no more—a welcome change for attorneys with little time for learning software overgrown with features they'll never need.

"My 2-year-old knows how to navigate back and forth between apps," Burton says, "so lawyers should be able to do the same."

Burney's firm advises corporate executives and legal professionals on e-discovery, offers litigation support, and provides guidance on choosing legal software. He adds, "When you're in an app, you're not stressed out by a bloated number of features. The interface is usually intuitive with only the buttons and features that you need

KILLER APPS FOR LAWYERS

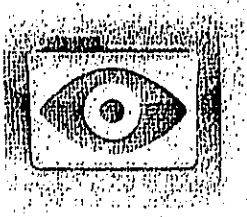
WestlawNext

"The WestlawNext client app on the iPad is very well-designed and easy to use, making it simple to get legal research done when you are in court or otherwise out of the office. In fact, the app is so nice that I will often use it even when I am in my office, doing my legal research on the iPad while my brief is open on my computer." Free with subscription. Also available for Android.

—All iOS app reviews by Jeff Richardson, author of the iPhone JD blog

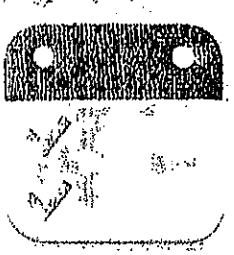
GoodReader

"I store key pleadings, briefs, exhibits, et cetera, in a Dropbox folder on my computer and then, with the press of one button in GoodReader on my iPad, they are synced over. This is the most useful app on my iPad." $4.99 in the Apple App Store.



Reminders

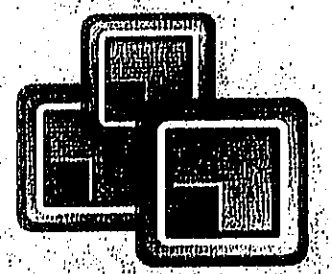
"This built-in app from Apple is great for keeping simple to-do lists. But I really like using Reminders with Siri to create time- and location-based reminders. I can just tell my



iPhone 'Remind me to call back John Doe when I get to my office,' and sure enough, soon after I return to my office, my iPhone notices I am there and gives me the reminder." Free.

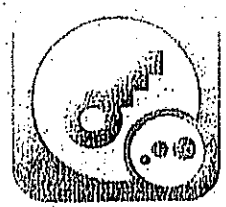
Documents to Go

"This is my favorite app for reviewing a Microsoft Word document on my iPhone or iPad because it handles footnotes, unlike other apps like Quickoffice. Documents to Go also shows red-line edits and is rock-solid, unlike some other apps that handle Word files. I love the way that the app lets you zoom the text and reformats the line wraps, thus making it the best app for reading the words in a Word file." $9.99 in the Apple App Store. Also available for Android.



LogMeIn

"I can easily access the PC in my office using LogMeIn—useful when I need to grab a file that was on my desktop or use software for which there is not yet an iPhone/iPad client, such as my firm's time-entry system or document-management system. The app also has a great set of shortcuts for controlling the remote screen and is free to use



to complete the task in front of you."

Plus, the "instant-on" capability of mobile devices makes the alternative—waiting for a PC to boot up for what seems like an eternity—seem hopelessly antiquated. With an app, you flip the switch on a phone, tablet or similar device and you're working.

Many apps also offer attorneys fingertip access to all the firm's data that's stored in the cloud, no matter where they happen to be.

"If the firm or lawyer uses cloud platforms for practice management and document management," Burton says, "apps allow instant access to a client's information whether the lawyer is in a conference room at the firm, at the client's office or traveling."

"I no longer need to worry about wasting time while waiting for a doctor's appointment or sitting idly on a train," says Jennifer Ellis, vice president of Freedman Consulting Inc. in Lansdale, Pa. "My smartphone apps enable me to catch up on and act in response to emails, communicate with social media networks and perform work for my clients at any time."

With a smartphone or tablet ever at the ready, the perennial problem of tracking billable hours also becomes eminently manageable.

"Trying to remember time later invariably results in lost billable hours," says Ellis. "Keeping track of time with an app that is always in the attorney's pocket is a great way to help with this problem."

With the installed base of mobile devices now pervasive throughout all strata of society, apps offer attorneys the opportunity to communicate with clients on a much more intimate level, if they so choose. With "lawyers carrying their phones with them all the time," Burney says, "I believe that [videoconferencing programs] Skype and Facetime will become more prevalent in communication."

APP HUMBUG?

Granted, there are those who are less than enamored when it comes to computing's latest wrinkle.

Barron K. Henley, a Columbus, Ohio-

for the functions most people are looking for." Free. Also available for Android as LogMeIn Ignition.

Depose

"This app gives attorneys the ability to prepare for and take depositions using their Android device. The app gives users the ability to directly enter the questions or upload them in plain text. Users can attach exhibits to the question; then you'll only need one copy for the witness. The developer is eager to improve the app too, adding functionality and beefing up the user interface." $7.99 in Google Play.

—All Android app reviews by Jeff Taylor, author of the Droid Lawyer blog

Fastcase and dLaw

"Fastcase provides free legal research capabilities for a tablet or smartphone, while dLaw provides offline statutes and rules. Great research sources." Both are free. Fastcase is also available for Apple mobile products.

Dropbox

"Dropbox allows me to carry my files or access information across a variety of devices. If there's any one app I use more than Gmail or Google Calendar, it's Dropbox." Free; professional version at $9.99 per month. Also available for Apple mobile products.

EzPDF Reader

"EzPDF Reader is a high-class PDF editor/reader that adds annotation functionality and several other dynamic capabilities." 99¢ for Lite version or $3.99 for Pro version in Google Play. Also available for Apple.

SignMyPad

"I'm moving more into a fully digitized law practice, and one way to accomplish this is to provide the ability to electronically sign a document with SignMyPad. Now, instead of printing, signing, scanning and filing, I can email the document to my assistant, who then moves it to the client's file." $3.99 in Google Play. Professional version at $19.99. Also available for Apple mobile products.

based partner at Affinity Consulting Group, a legal consulting business, sees today's current crop of mobile devices as little more than toys.

"I have an iPad, and although I like using it to read things, I find it slow and inefficient to use for almost anything else," Henley says. "Because I can type fast, I much prefer the full-size keyboard on my laptop. Even if I bought an external keyboard for the iPad, I would much prefer the 15.5-inch screen on my laptop over the 9.7-inch screen on the iPad."

What's more, he says, "for creating content, I find tablets to be awful. Microsoft Office isn't installed on my iPad, nor can it be, and almost none of the programs I use daily will run on an iPad. Of course I could try to find apps that do some of the same things. But to me, it's just a big waste of time. I already have the programs on my laptop.

"So I view tablets as an accessory. I can't run my practice or business on one. But they're fun to use, easy to take with me and pretty nice for reading. If ultrabooks live up to their potential of being the best of a PC and a tablet in one package, I'll give my iPad to my kids, who will use it for what it seems designed for in the first place—playing games."

Fortunately for app makers, there are hordes of attorneys who do not share Henley's view. Consequently, app fans can look forward to another torrent of fresh product—both from software vendors and firms looking to stay technologically current—during the coming year.

"Tablet penetration in the legal field is on a very steep and rapid adoption curve, and that creates the pull for more apps," says Paul Mansfield, president of his own legal technology consulting firm in Corrales, N.M. "So we'll see all of the legal market vendors vying for position by tying mobile devices to their core systems, either directly or via a cloud interface."

ADD ULTRAPORTABLES

Further intensifying the availability of apps is the anticipated emergence of ultraportable laptops as a serious alternative to tablets and smartphones, Mansfield adds. These devices will appeal to lawyers who are

GO NATIVE OR HTML5—AN APPORTUNITY

Law firms with ambitions of releasing their own apps in the near future will first need to decide whether they want a single version to run on all devices or take a more customized approach.

Unwittingly, the decision will force them to pick sides in a debate raging across the Web—whether to program in HTML5, a one-size-fits-all solution, or design multiple versions of the app for each of mobile's native operating systems: Android, Apple iOS, Microsoft Windows Mobile OS, BlackBerry and the like.

It's a conundrum that has befuddled some of the digerati's savviest, including Mark Zuckerberg, CEO of Facebook. "I think that the biggest mistake we made as a company is betting too much on HTML5 as opposed to native—although long term, I'm really excited about [HTML5]," Zuckerberg told showgoers at TechCrunch Disrupt this past September.

An early adopter of the language, Zuckerberg backtracked after watching HTML5 apps designed for Facebook run at a crawl. His firm is now in the process of releasing rewritten versions designed to run on specific mobile operating systems.

Like many techies, Zuckerberg was lured in by the seemingly elegant simplicity of HTML5, which enables developers to write an application for the Web that can be run on any mobile device having a browser.

With HTML5 there are also no royalty fees to pay because it is not proprietary; anyone can design for free in the language. And there is also no 30 percent distribution fee to pay the Apple App Store, since HTML5 apps can be freely shared across the Web.

There are several heavyweight firms getting behind the HTML5 standard, including the software company SAP, which announced last spring it was partnering with Adobe and a number of significant software partners to champion apps in HTML5.

"SAP customers, partners and the entire ecosystem now have a tremendous opportunity to rapidly produce millions of high-quality apps using the tool of their choice," says Sanjay Poonen, SAP president of global solutions.

But for some, HTML5 has not completely lived up to its press. Its apps sometimes run slower than the same apps designed for specific mobile operating systems. In addition, mobile browsers sometimes lag behind the latest advances in HTML5, causing cutting-edge apps to run less efficiently than envisioned.

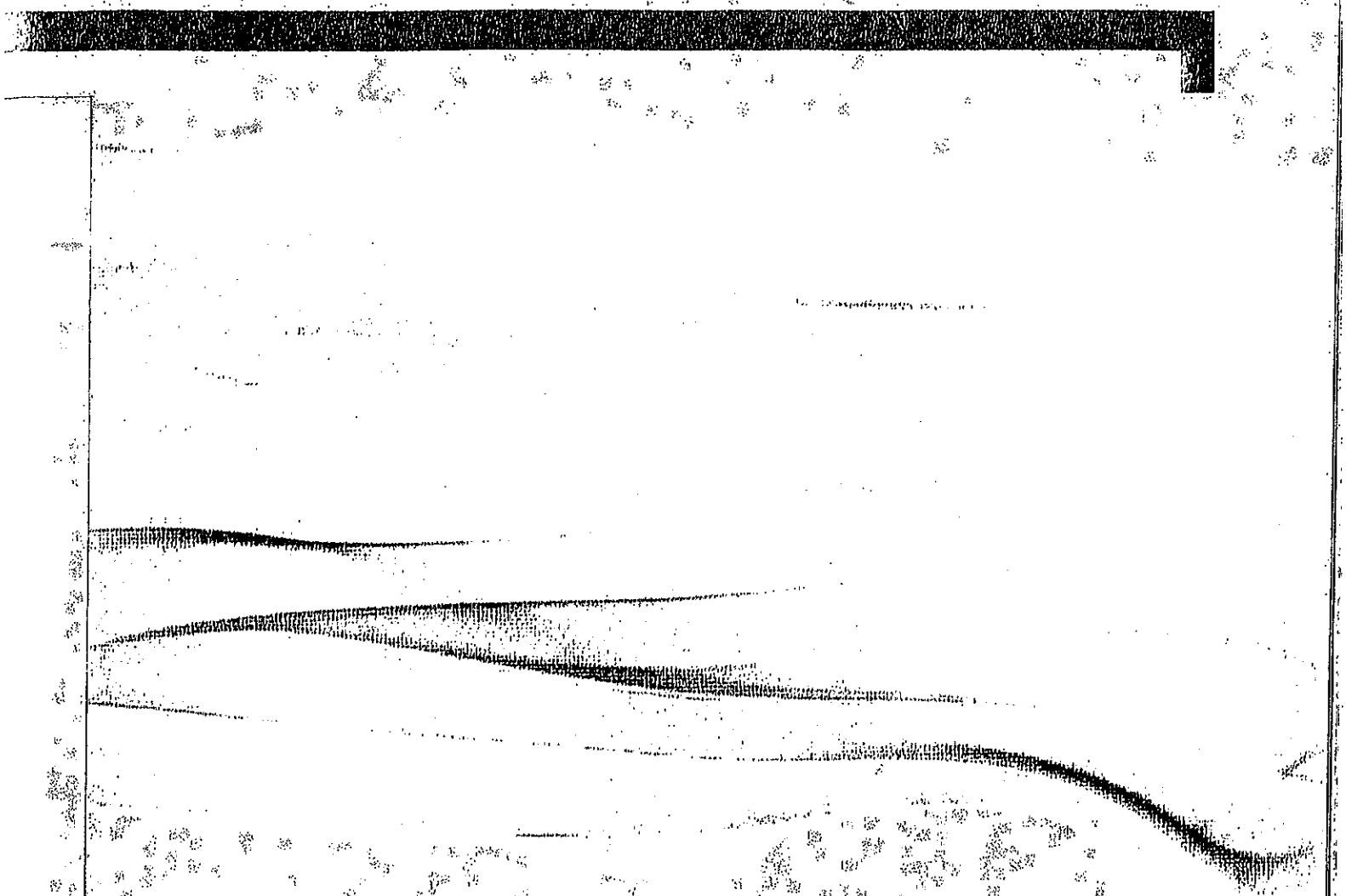
Still, the alternative—designing different versions of your law firm app to run on different operating systems—can seem equally unappealing, especially if your law firm has limited IT funds.

If you're caught between that rock and a hard place, you may want to try a third approach. Software firms like VizApps, for example, are offering app-authoring software that claims to combine HTML5 and native app authoring in one. To users, hybrid apps are like native apps in that they can take advantage of device features, such as the camera and GPS, according to George Adams, VizApps CEO.

And the apps can be distributed through an app market like the Apple App Store or Google Play.

But unlike native apps, hybrid apps also seamlessly integrate Web content and add Web features where needed, with coded extensions, Adams says.

As a result, he says, hybrid apps provide the flexibility for mobile business apps to access Web content and integrate advanced functionality, such as that needed for mobile games and complex app logic.



looking for something in a larger format that is still thin and light and offers instant-on capability by using a solid state drive.

Also, Microsoft's rollout of Windows 8, a touch-screen operating system designed to run on all hardware formats, will only create more demand for apps. "Add Windows 8 to the mix," Mansfield says, "and the user interface becomes totally transparent across the spectrum of devices: desktop, laptop, tablet and smartphone all look alike. That's all good."

The only major caveat amid all the app fervor is security. Over the years, law firms and corporate clients have put all sorts of safeguards in place regarding the data they're entrusted to guard on mainframes, desktops and, more recently, laptops. But the seemingly overnight proliferation of mobile devices across the legal profession, sometimes without the development of policies for protecting client data, has put too many attorneys at risk.

"Like anything else that puts client data outside the safety of the office, we have to be sure proper security precautions are in place," Mansfield says. "Attorneys who purchase these devices and 'go rogue' with them—not hooking them into the firm's network and security—are taking unnecessary risks. It's better to have total buy-in from the firm."

He adds: "Be careful out there. It's a jungle."

Debbie Foster, a Tampa, Fla.-based partner at Affinity Consulting Group, agrees.

"There are simple security measures that lawyers need to take with their mobile devices," she says. "They must understand the risks of carrying around client data on your device, and all devices should have strong passwords and remote-wipe capabilities in the event the device is lost or stolen."

Joe Dysart is a freelance writer based in Manhattan.

THE CHANGING FACE OF THE LEGAL PROFESSION:

REPORT OF THE ABA COMMISSION ON ETHICS 20/20

&

IS THE BIGLAW MODEL DYING?

ABA Commission on Ethics 20/20

www.americanbar.org/Ethics2020

ABA Commission on Ethics 20/20: Studying a "New Normal"

Created in 2009 to study how rules and policies concerning lawyer conduct need to be revised in light of:

- Changes in Technology
- Globalization

Commission Outreach to Date

- Early release of draft proposals and revised drafts
- Hundreds of comments received on the Commission's initial proposals and papers
- Public hearings held throughout the country
- 75+ presentations to ABA entities as well as state, local, specialty, and international bar associations

Timeline for Commission Proposals

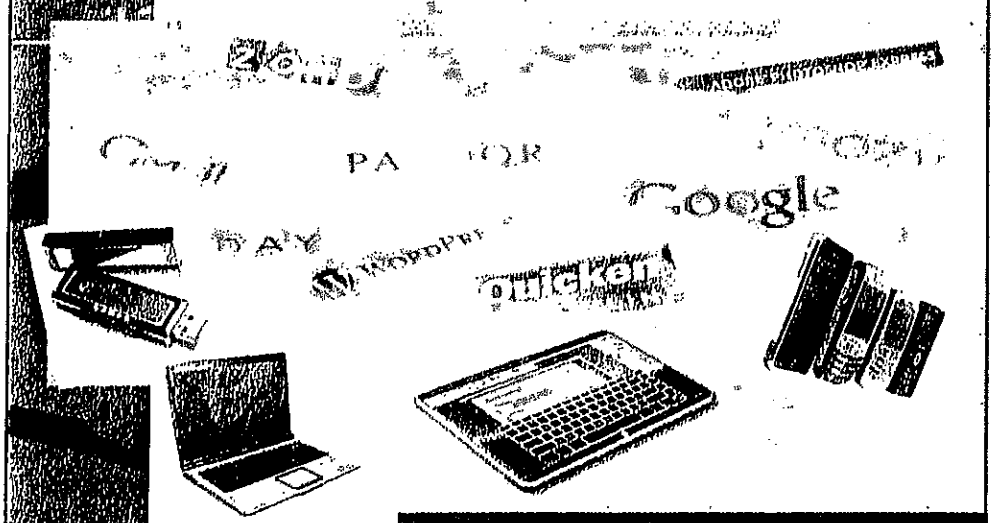
August 2012

- Technology (confidentiality)
- Technology (marketing)
- Outsourcing
- Mobility Issues (admission in new jurisdictions, conflicts screening for laterals)

February 2013

- Conflicts-related choice of law issues
- Alternative Law Practice Structures (including choice of law issues)
- Inbound Foreign Lawyers

Technology Working Group (Confidentiality)



The Reality: Protecting Client Information

Proposal to Amend Model Rule 1.6 (Duty of Confidentiality)

(c) A lawyer shall make reasonable efforts to prevent the unintended disclosure of, or unauthorized access to, information relating to the representation of a client.

Other Key Commission Proposals in this Area

- Amendment to Comment [4] to Model Rule 1.4 (Communication), telling lawyers that they need to respond promptly to "client communications" and not just "telephone calls."
- Amendments to Model Rule 4.4(b) (receipt of misdirected documents) to clarify that a lawyer's duty to notify the sender of a mistake arises for both documents as well as "electronically stored information" (including electronic metadata).

Technology (Client Development)

NAME
ATTORNEY AT LAW

ADDRESS 1
ADDRESS 2

PHONE
EMAIL

The Past

Amendments to Comment [5] to Model Rule 7.2 (Advertisements)

"A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

Amendments to Model Rule 7.3 (Solicitations)

"A solicitation is a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services."

"In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public . . . or if it is in response to a request for information or is automatically generated in response to Internet searches."

Alternative Legal Practice Structures

Issues Paper (April 2011) –

- Global and domestic scan of legal practice environments in which U.S. lawyers and law firms are working, including District of Columbia, England and Australia.
- Five options distilled

Commission determined NOT to proceed with:

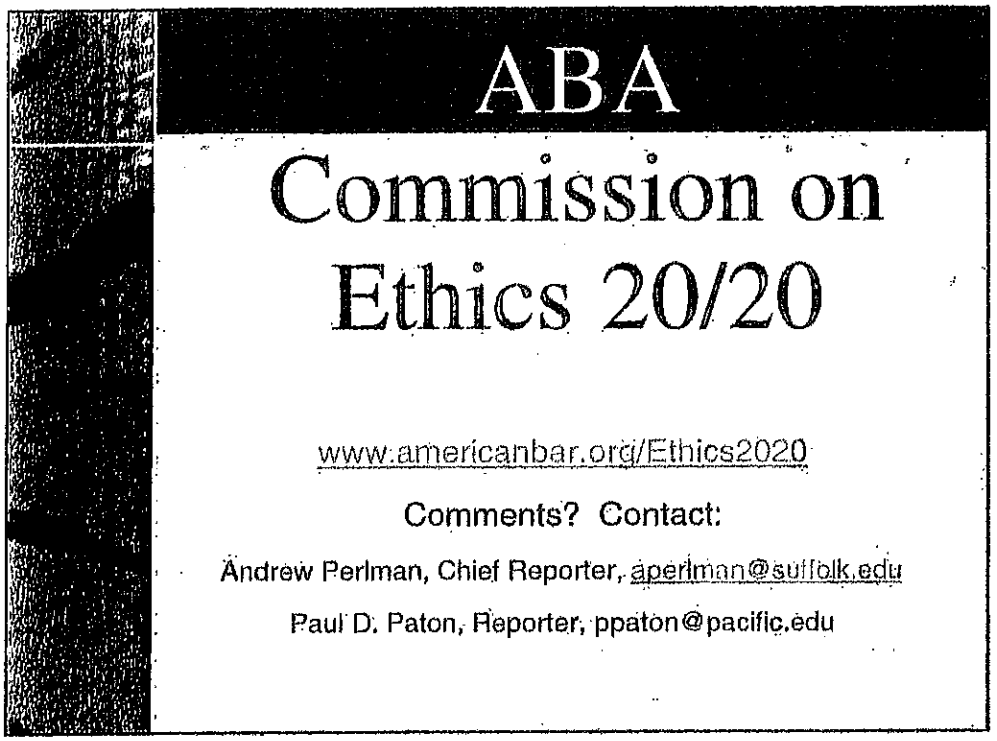
- Publicly traded law firms;
- Passive, outside nonlawyer investment in law firms
- Multidisciplinary practice

Alternative Legal Practice Structures

Discussion Draft (December 2011)

Recommends adoption of modified version of District of Columbia Model Rule 5.4 in place for over 21 years:

- Permits limited nonlawyer ownership in law firms BUT
  - Such law firms restricted to providing legal services
  - Nonlawyers must be active in the firm, providing services supporting the delivery of legal services by the lawyers (i.e, no MDP)
  - Nonlawyer ownership and voting interests restricted by percentage cap to ensure lawyers retain control
  - Nonlawyers agree to conduct themselves in accordance with lawyer Rules of Professional Conduct
  - Lawyer owners responsible for ensuring nonlawyer owners are of good character


ABA
Commission on Ethics 20/20
www.americanbar.org/Ethics2020
Comments? Contact:
Andrew Perlman, Chief Reporter, aperlman@suffolk.edu
Paul D. Paton, Reporter, ppaton@pacific.edu

ECONOMY JULY 21, 2013

The Last Days of Big Law
You can't imagine the terror when the money dries up

BY NOAM SCHEIBER

Of all the occupational golden ages to come and go in the twentieth century–for doctors, journalists, ad-men, autoworkers–none lasted longer, felt cushier, and was all in all more golden than the reign of the law partner.

There was the generous salary, the esteem of one's neighbors, work that was more intellectual than purely commercial. Since clients of white-shoe firms typically knocked on their doors and stayed put for decades–one lawyer told me his ex-firm had a committee to decide which clients to *accept*–the partner rarely had to hustle for business. He could focus his energy on the legal pursuits that excited his analytical mind.

Above all, there was stability. The firms practiced a benevolent paternalism. They paid for partners to join lunch and dinner clubs and loaned them money to

buy houses. When a lawyer had a drinking problem, the firm sent him off for treatment at its own expense. Layoffs were unheard of.

Perhaps more importantly, the security of the legal profession lodged itself inside our cultural imagination. For generations, the law functioned as a kind of psychological safety net for the ambitious and upwardly mobile. If you wanted to be a writer or an actor or a businessman, you could rest assured that law school would be there if your plans fell through. However much you'd maxed out your credit card, however late you were on your rent, you were never more than an admissions test and six semesters away from upper-middle-class respectability.

"Stable" is not the way anyone would describe a legal career today. In the past decade, twelve major firms with more than 1,000 partners between them have collapsed entirely. The surviving lawyers live in fear of suffering a similar fate, driving them to ever-more humiliating lengths to edge out rivals for business. "They were *cold-calling*," says the lawyer whose firm once turned down no-name clients. And the competition isn't just external. Partners routinely make pitches behind the backs of colleagues with ties to a client. They hoard work for themselves even when it requires the expertise of a fellow partner. They seize credit for business that younger colleagues bring in.

And then there are the indignities inflicted on new lawyers, known as associates. The odds are increasingly long that a recent law-school grad will find a job. Five years ago, during a recession, American law schools produced 43,600 graduates and 75 percent had positions as lawyers within nine months. Last year, the numbers were 46,500 and 64 percent. In addition to the emotional toll unemployment exacts, it is often financially ruinous. The average law student graduates $100,000 in debt.

Art Streiber

Meanwhile, those lucky enough to have a job are constantly reminded of their expendability. "I knew people who had month-to-month leases who were making $200,000 a year," says an associate who joined a New York firm in 2010. They are barred from meetings and conference calls to hold down a client's bill, even pulled off of cases entirely. They regularly face mass layoffs. Many of the tasks they performed until five or ten years ago–like reviewing hundreds of pages of documents–are outsourced to a reserve army of

contract attorneys, who toil away at one-third the pay. "All these people kept on going into this empty office," recalls a former associate at a Washington firm. "No one introduced them. They were on the floor wearing business suits. ... It was extremely creepy." Still, any associate tempted to resent these scabs should consider the following: Legal software is rapidly replacing them, too.

Part of the reason the law-firm ecosystem has changed so dramatically in a single generation is greed: The most profitable partners steadily discarded their underachieving colleagues, because they didn't want to share the spoils. And part of the reason is the brutal recession that began in 2007, prompting corporations to slash every conceivable expense, law firms included. But the biggest problem is that there are simply many, many more high-priced lawyers today than there is high-priced legal work.

The crisis in the profession isn't likely to improve, either. In late June, the New York-based Weil Gotshal, one of the most alabaster of white-shoe firms, announced it was laying off 60 associates, about 7 percent of its total. A few dozen of the firm's 300 partners will see their pay cut, in many cases substantially. The news shook the legal community, both because of Weil's pedigree and because it was one of the few firms that had weathered the recession intact. Almost as disconcerting as the firings was the way the firm's executive partner, Barry Wolf, explained them. "We believe that this is not just a cycle, but that the supply-demand balance is out of whack across the industry," he told *The New York Times*. "If we thought this was a cycle and our business was going to pick up meaningfully next year, we would not be doing this."

There are currently between 150 and 250 firms in the United States that can

THERE ARE MANY, MANY MORE HIGH-PRICED LAWYERS TODAY THAN THERE IS HIGH-PRICED LEGAL WORK.

claim membership in the club known as Big Law, the group of historically profitable firms that cater to the country's largest corporations. The overwhelming majority of these still operate according to a business model that assumes, at least implicitly, that clients will insist upon the best legal talent instead of the best bargain for legal talent. That assumption has become rickety. Within the next decade or so, according to one common hypothesis, there will be at most 20 to 25 firms that can operate this way—the firms whose clients have so many billions of dollars riding on their legal work that they can truly spend without limit. The other 200 firms will have to reinvent themselves or disappear.

So far, the transition has not been smooth. In fact, the more you talk to partners and associates at major law firms these days, the more it feels like some grand psychological experiment involving rats in a cage with too few crumbs.

If you set out to pick a single firm to capture the escalating plight of Big Law, it would be hard to do better than the Chicago-based Mayer Brown.

At the time of its founding in the early 1880s, there were two basic approaches to running an establishment law firm. The prototype for the first was Cravath, which traced its lineage back to Secretary of State William Seward in the 1800s and became perhaps the most genteel firm in America. The "Cravath model," which spread to other corporate firms on Wall Street, was to hire a large number of associates from the five or ten best law schools in the country and then weed them out, so that only the most brilliant legal minds ascended to its partnership. (Historically, about one in twelve associates made partner.) Those who didn't advance nonetheless came away with the most sterling legal credential in the world. They had their pick of top

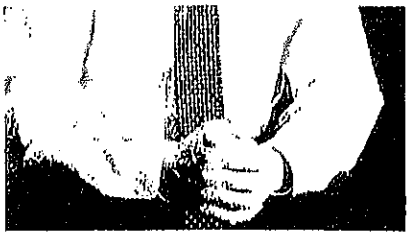
government and corporate jobs, or partnerships at other leading firms. In the meantime, they were socialized into the mores of the gentleman lawyer –rivals referred to Cravath as "graduate school" for attorneys–while the firm made a killing by billing them out at top-of-the-market rates.

The alternative approach might be dubbed the "Chicago model," after the city that housed the most white-shoe firms outside New York, though it took hold in most other large cities, too.[1] Befitting its Midwestern roots, the Chicago model was less competitive. Although the top Chicago firms could be quite choosy in their hiring, says Indiana University's Bill Henderson, they typically had far more partnership slots available for the associates they brought on and promoted many more of them. As a result of this lower "leverage"–the ratio of non-partners to partners–the Chicago firms were traditionally less profitable. But they were less rigid and hierarchical, and gave associates more responsibility sooner.

Mayer Brown was the paradigmatic Chicago firm. Thanks to its ever-accumulating pile of clients, money, and influence, Mayer Brown could afford to be exceptionally generous to its lawyers, and it took great pride in nurturing them. For decades, its nickname was "Mother Mayer." Every morning at 9 a.m., the most senior partners mixed with the lowliest associates over donuts and Danish in an

MOTHER MAYER'S CHILDREN

eighteenth-floor coffee room. At night, they would huddle at Binyon's, a nearby restaurant, to dine on the firm's tab. "It would envelop you, take care of you forever," says a former partner. Admission to the partnership after seven years was the natural order of the universe as Mayer Brown understood it. "The ground rules were: Do legal work of a high quality. Work reasonably hard, and keep your nose clean. Don't make stupid mistakes," says Alan Salpeter, who joined the firm in 1972 and became one of its highest-billing partners. "I was not exceptional."



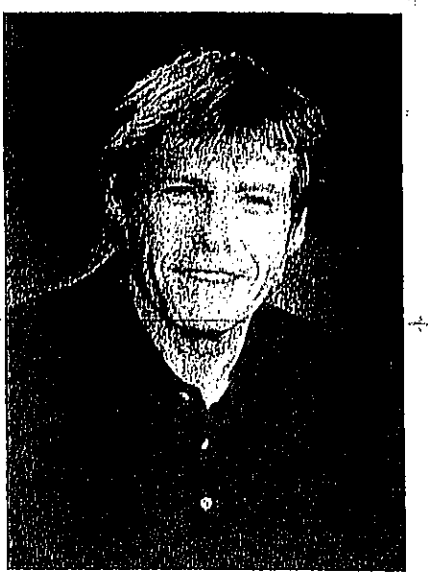
Mayer Brown LLP.

PAUL THEISS

Mayer Brown's chairman isn't particularly bullish about the law's future: "I don't think ... that this isn't only a temporary situation," he said.

The only major adversity Mayer Brown encountered came in 1984, when Continental Illinois Bank, which supplied one-third of the firm's revenue, collapsed amid a pile of bad oil-patch loans. It took some heroic improvisation by the firm's then co-chairman, Bob Helman, to navigate the turmoil.[2] But such was Mayer Brown's sense of entitlement—so validating was the glow it lent clients—that even Continental couldn't shake it. Within a few years, Mayer Brown was minting partners with little regard to the bottom line.

MOTHER MAYER'S CHILDREN



Greenberg Traurig Maher LLP.

In the meantime, some firms outside New York were already beginning to depart from the Chicago model. The proximate cause was a previously obscure statistic known as profits per partner, or PPP—the firm's profits divided by the total number of equity partners. The PPP came into vogue in 1985, when a trade publication called *The American Lawyer* began publishing an annual ranking that touted it heavily. All of a sudden, firms that had previously considered themselves rough equals discovered they were separated by vast chasms of wealth.

Many believed the PPP numbers would be self-reinforcing. Firms with high PPPs would have an easy time attracting rainmakers from rivals and become ever more successful. On the other hand, a low PPP could send a firm into the equivalent of a bank run: The most profitable partners would depart for bigger paydays, depressing PPP further and encouraging the next most profitable partners to leave.[3]

PAUL MAHER

Maher was a divisive figure within the firm (nickname: the Dark Sith Lord) who felt as if it was too staid for its own good.

By the early 2000s, even Mother Mayer was anxious about this changing landscape.[4] To make things worse, clients were beginning to question the expenses firms long used to pad their bottom lines—everything from 25 cents a page for photocopying to $250 an hour for a first-year associate with no legal skills to speak of. It was fair to wonder whether Mayer Brown would soon be earning too little to support its sprawling brood. In 2002, it acquired the London firm Rowe and Maw in hopes of adding lucrative bank business. But Rowe and Maw had less cachet in the United Kingdom than many at Mayer Brown had been led to believe, and the profits were disappointing. Many in the firm's leadership believed they had little choice but to cut unprofitable partners.

MOTHER MAYER'S CHILDREN

Mayer Brown LLP

JOEL WILLIAMSON

A tax attorney and a legend at Mayer Brown. Colleagues don't begrudge him his multimillion dollar salary—they just begrudge other peoples'.

The most formidable figure in this internal debate was the ambitious head of the firm's London office, Paul Maher. Maher inspired a mix of awe and resentment, with his withering rhetorical style (he was prone to belittling partners "uncontaminated with clients") and brass-tacks assessments (he opined that struggling satellite offices like New York and Los Angeles should be hacked down to size). Some of the firm's big producers appreciated Maher's modernizing ways, but several Chicago partners were deeply suspicious, dubbing Maher the "Dark Sith Lord."[5] Maher, in turn, alternately (if not always coherently) referred to his detractors as "the isolationists" and "the neocons."

Maher's view eventually prevailed. "You can't pay a guy writing briefs seven hundred, eight hundred, nine hundred thousand, a million dollars," says a former partner, describing what the rainmakers dubbed "bracket creep." In 2007, the firm's management committee stripped more than 10 percent of these brief-writers of their equity stake—45 total—only weeks before Mayer Brown held its annual partners meeting in London.[6] The timing was unfortunate. Many partners had already reserved plane tickets for their spouses at their own expense. "They were all ready to go when the pink slips came out," recalls a partner with a close friend who was affected. "One of the guys let go had that day booked a flight for his wife."

The partners who made the trip were unsettled by its poshness. Mayer Brown had rented out the Grosvenor House hotel, one of the most expensive in London, and booked top billers into cavernous suites overlooking Hyde Park. One evening, the firm chartered boats to take partners down the Thames for dinner at the Royal Observatory in Greenwich. When they arrived, they were escorted down a canvas carpet by guides carrying torches and dressed like beefeaters. The speaker for the evening was the future British foreign secretary, William Hague.

Back at the hotel, the conference featured presentations by senior partners, including Maher, who took the stage amid strobe lights and booming rock

music. "It was like one of Apple's product launches," recalls one partner. Maher talked about integrating all corners of Mayer Brown's far-flung empire. Above all, he dwelled on the need for profitability. Some of Mayer Brown's rivals were boasting PPP of $2 million. Maher set a goal of approaching that figure, an ambitious target given that the firm's profits were barely more than half this amount. Sitting there, "rolling their eyes at the volume and the lights," as one partner recalled, the old guard no longer recognized the firm they had joined.

No relationship in the legal profession is more fraught than the one between partners and their money. On the one hand, the generous pay is a major reason they became attorneys in the first place. On the other, it is often their biggest source of misery.

Although there are almost as many different schemes for compensating partners as there are law firms, they all fall somewhere along a spectrum that runs from "eat-what-you-kill" to "lockstep." In a pure eat-what-you-kill system, each partner takes home only what she generates in income, after covering expenses and paying staff and associates. In a pure lockstep system, pay isn't tied to what a lawyer brings in, and partners of the same seniority make the same amount. The classic lockstep firm is New York-based and corporate, so overflowing with pedigree that it has its pick of business. (The old joke is that times are tough when Cravath picks up the phone after two rings rather than three.)

For decades prior to the 1980s, Mayer Brown tilted in the lockstep direction. But, after the collapse of Continental, Bob Helman realized the firm would go under if his partners sat around waiting for business to walk in the door. Hereafter, he decreed, each partner's compensation would depend heavily on the amount of business he or she drummed up.

Helman's plan may have worked too well. Ever since it went into effect, partners have competed aggressively not just against lawyers at other firms, but against one another. Chicago partners would fly into New York to poach clients from their Manhattanite counterparts, holding clandestine meetings in which they would pitch themselves as less expensive and a mere two-hour plane ride away.[7] When the New Yorkers invariably caught wind of these plots, they would remind clients that they were far more efficient than their Midwestern cousins. "What we would end up saying is ... 'Chicago will staff you with four partners on something we'd staff with one or two,'" recalls a former partner. "It's crazy that I have to go in and have a conversation about it. Denigrating." (The problem has been somewhat mitigated in recent years by more formal firm-wide "client teams," though many still complain about the struggle to be included.)

Like most large law firms, Mayer Brown has a well-established system for tracking the hours a partner bills and the amount of business he or she generates for the firm. This—especially the second—is the ostensible basis of his or her pay. As a result, the process of determining compensation would seem to be largely mechanical: The data come in, the numbers get tallied, and a final sums pop out.

In practice, settling on compensation for partners at Mayer Brown, as at many firms, is an elaborate ritual that runs through the first two months of each year and includes a remarkable amount of special pleading by way of memos and personal interviews. Finally, in late February, the management committee hands down the "points list," Ten Commandments-style, enumerating what share of the firm's profits each partner is entitled to. In a typical year, each "point" might be worth $3,000, so that someone who

received 500 points would take home $1.5 million. (The firm may also award a bonus on top of this amount.)

Unlike most other firms, Mayer Brown then introduces a final wrinkle: The points list is disclosed for all to see. Since each partner aspires to be among the 50 who make the first page, where the highest earners appear, the amount of resentment this engenders is hard to overstate.

Before 2007, there were often 75 or 100 different levels of income. Two partners making over a million dollars per year could be separated by as little as ten thousand dollars. Now, the firm has more of a lockstep model, slotting every partner into one of roughly 15 "bands" and awarding each person within a band the same number of points.

Alan Dershowitz, Michael Kinsley, and Others on How to Fix Law School

The new system was supposed to eliminate the brutal internal competition for credit and the frenzied haggling during compensation season. "It was very clearly explained to people that, when you're in a band, you're probably in it for two-to-three years," recalls a former partner on the firm's management committee. "If you had a great onetime year, you'd get a bonus. ... But you're not going to move a band because of one change." It didn't pan out that way. "Practice leaders ... would say, 'Here are fifteen people who need to move a band,'" adds the partner. "All hell broke loose."

Given that it is human nature to hoard in lean times, it didn't help that a recession was about to bear down on the firm. When the points sheet came out in February 2009, partners discovered that each point–the share of profits they were entitled to–was worth roughly 20 percent less than the previous year, a huge pay cut. The following February, the points were devalued by 10 percent more. This in itself was understandable; the firm had been hit hard by the financial crisis. But when the partners looked more closely at the points list, they noticed something infuriating: A small minority of their colleagues had been made whole through bonuses.

Some of the beneficiaries were major business generators. As 2008 wore on, many of these big shots had eyed the exits and a few began to leave. "Rich Morvillo"–a prominent white-collar criminal defense lawyer–"said, 'I don't want to be the last man standing in D.C. If there's going to be an exodus, I'm going to be part of that,'" recalls one former partner. Meanwhile, others simply let it be known that they were out the door unless the firm opened its wallet–"the table-pounders," as some called them. While the logic of appeasing them was self-evident, the message it sent was terrible. "There was a sense among many of us at the time that the firm had in good faith been trying to move from eat-what-you-kill to a more collectivist culture," recalls one former partner. "It was a serious backtrack–punishing partners who had been playing by the rules."

Even more frustratingly, entrée into this protected class didn't always

correspond to productivity. The 2010 points sheet, which one partner shared with me, illustrates the problem. There is exactly one person in band 16--a tax lawyer named Joel Williamson, who was awarded 768 points that turned out to be worth about $2 million, along with a standard bonus of $400,000 and a "super-bonus" of $400,000 more.[8] Williamson is a giant of his profession and brings in several dollars for each one he earns. No one begrudges him his generous compensation. But not far below Williamson, there are names that inspire more controversy.

One is a litigator named Joe De Simone, who joined Mayer Brown in 2000 and made equity partner six years ago. De Simone is a talented lawyer with powerful patrons and a knack for landing important positions in the firm.[9] As such, he has been a reliable generator of revenue, but much of it has come by way of what's known as "institutional business"--firm business that falls in his lap.

Between 2008 and 2010, De Simone vaulted from band four to band eleven, an almost unheard-of ascension. This new status afforded him 508 points (worth $1.13 million in 2009). De Simone received no standard bonus on the 2010 points list, but was awarded a $400,000 bonus marked "other." (He told management that he'd received an offer from another firm.) "Joe was way behind what his business generation and client service commitment would justify," says Richard Spehr, the head of the New York office. "We felt that Joe's compensation should reflect his total contributions to the firm, including representing institutional clients."

When the firm was flush, few might have minded rewarding a good company man like De Simone. In these leaner times, though, it stung. Any bonus "violates the concept of partners working together," says a former colleague, who brought in several times the business that was expected of him--all of it his own--and still saw his pay cut substantially. But it was the second-level bonus that really chafed. "It's just noted as a special arrangement," adds the colleague. "You have no idea how big that pool is."

"THE PRIMARY TALK WE WOULD GET WAS, 'OUTSOURCE YOUR LIFE.'"

There was frustration with other aspects of the new compensation system, too. Previously, partners were reluctant to ask colleagues to help on their pitches, because credit was a zero-sum game: If a partner landed the business, she would have to award some of the credit to the colleague, leaving less for herself. Under the new rules, the firm allowed the partner to claim up to 100 percent of the credit herself, then dole out up to 100 percent more among any partners who had helped.

This encouraged collaboration at times, according to several former partners. The downside was that many began to view the additional 100 percent worth of credit as a slush fund, ladling it out to friends with little role in their cases or transactions. "It led to sleazy deals," recalls one former partner. "It took about thirty seconds for people to figure it out." Says a former finance lawyer of two senior partners in his group: "I saw the billing going around. One was getting credit on stuff the second opened, and the second was getting credit for stuff the first one opened." There seemed to be no way around it: The more Mayer Brown set out to fix its problems, the more deviously its partners behaved.

As demeaning as life can be for a partner these days, it's altogether soul-crushing for an associate. One of Mayer Brown's young attorneys recalled scaling back her hours around the time her first child was born. The new schedule meant getting to the office by 6:30 a.m. so she could leave by 6 p.m., in time to put her daughter to bed. The problem arose when she had to work late, a not infrequent occurrence. "Then you're in the office

from 6:30 a.m. till 1 a.m. It sucks even more," she says. Periodically, some of the women partners would lead seminars on striking a work-life balance, but she found them of limited use. "The primary talk we would get was: 'Outsource your life. Your husband can stay at home. Or you can hire a cook, a cleaning staff, and you can [spend time with your kids] on vacations.' Thanks."

The legal profession has, of course, struggled with these challenges for decades. The problem is that the rewards today are less certain than ever before. There is, for one thing, the ever-lengthening partnership track. In 2004, the firm introduced something called an "income partnership," a probationary period in which promising lawyers have to prove their worth before earning an equity stake. To the outside world, it looked like the income partner had arrived. Her business card said she was a partner, as did the press release the company issued. But, in reality, making income partner typically means three-to-five more years of hustling, after which the lawyer may come up for the true promotion. (It wasn't lost on associates that, when a lawyer becomes an equity partner, she receives a budget to order plush new furniture, while income partners keep "the same stuff I had," as one put it.) Becoming a bona fide partner at Mayer Brown, like many of its competitors, is now a ten-to-twelve-year proposition.

This epically drawn-out process has exacerbated other problems. While it never hurt to have a well-connected mentor within a law firm, today such a rabbi is essential for making partner. Unfortunately, it can be agonizingly difficult to figure out who will have influence years down the line, since partners constantly come and go or lose status within the firm. "You have to pick a horse in the race," says a former associate. "Your horse may win. It might get taken out back and shot. But if you don't pick a horse, you have no chance." In the early to mid-2000s, Mayer Brown's New York office was dominated by two prominent litigators who didn't get along and who eyed each other's associates warily. "Your first year, you figure, 'I'll be nice to everybody,'" says the associate. "Three years down the road, being nice to everybody is not doing anything for me."

As for their own protégés, the partners seem less invested than ever before. One former income partner told me the way he learned he had no future at the firm was through a two-line e-mail from the head of his practice group: "The partners have determined that you will not be an equity partner. If you have any questions, please contact me." He promptly called the senior partners he had been closest to during his decade at the firm, two of whom had attended his wedding. Neither ever responded.

Even lawyers with a dedicated mentor have trouble making equity partner unless they meet a second criterion: demonstrating a potential for attracting clients. There is an irony that flows from this. Lawyers at an elite firm like Mayer Brown have typically spent their lives amassing intellectual credentials. They are high-school valedictorians and graduates of elite universities, with mantles full of Latin honors. They have made law review at top law schools and clerked for federal judges. When, somewhere between the second and fifth year of their legal careers, they discover that brainpower is only incidental to their professional advancement–that the real key is an aptitude for schmoozing–it can be a rude awakening.

Fortunately, Mayer Brown doesn't expect its lawyers to actually drum up business until they make income partner, although it certainly isn't frowned upon beforehand. The bad news is that it's not only enormously difficult to accomplish this as a young lawyer; it can be a struggle to receive credit even when you succeed.

One Mayer Brown associate had worked at a large bank before joining the firm, and, in 2010, a former colleague there asked him to assist with a major financial transaction, quoting him a sizable fee. The senior partner in his group congratulated him on bringing in the business and told him they would work on it together. But, within a few weeks, the partner simply appropriated it for himself. "He said, 'I'm going to be working with [another lawyer] on this,'" recalls the associate. "It was pretty ballsy." Still, not as ballsy as what came next: A few months later, the partner went abroad on vacation with the deal still pending–and asked the associate if he might kindly wrap it up for

him.

In fairness, only an income or equity partner can open a "matter" (and therefore formally receive credit) under the firm's administrative scheme. But tales of partners gobbling up their younger colleagues' clients are legion. One lawyer recalled bringing in several cases as an associate, for which he assumed he would later get credit, only to have partners blow him off once he made income partner and tried to reclaim it. Another income partner worked on a transaction as part of a team with a more senior partner, and the client was interested in giving the firm more business. "[The senior partner] was pitching for work with the client behind my back," says this person, to whom the client forwarded the other partner's e-mails. "I congratulated him when he got a deal. He responded in a nasty way: 'You need to find your own work.'"

YOUR BEST HOPE AT LANDING CLIENTS, ONE ATTORNEY SAYS, IS TO ATTACH YOURSELF TO AN AGING PARTNER AND "STEAL HIS CLIENTS WHEN HE RETIRES."

The scratching and clawing was unquestionably made worse by the recession and its demoralizing aftermath. "[The partners] were under a lot of stress," says one of the wronged lawyers. "That was a tough, tough time." But the recent downturn only goes so far in explaining the behavior, which has been on display for years. One Mayer Brown partner named Mike Mascia was sufficiently scarred by the struggles he endured as a younger lawyer that he has since become famous around the New York office for his advice to junior colleagues. Your best hope at landing clients, Mascia says, is to attach yourself to an aging partner and "steal his clients when he retires."

Right, the recession. it is almost impossible to overstate the trauma of that moment on the associates who lived through it. For decades, elite law firms simply refused to entertain layoffs. In tough times, they might hire slightly fewer newbies. They might trim their numbers through attrition or let some go through suspiciously timed upticks of lousy performance reviews. But laying off dozens of associates at a time was simply too grim to contemplate. Besides, the big firms saw themselves in a bitter competition for the sharpest law school grads and worried that mass firings would get them blacklisted at the Harvards, Chicagos, and Berkeleys of the world.

Mayer Brown was among the first to break with this tradition, laying off 33 associates in November of 2008. Part of the problem is the way law firms hire associates, which effectively happens almost two years in advance, when they offer summer jobs to second-year law students. (Almost everyone who "summers" at a firm like Mayer Brown receives a full-time offer.) Although this makes every firm vulnerable to sudden economic collapse, it was especially debilitating for Mayer Brown. During the boom years of the mid-2000s, the firm had made a killing helping investment banks slice up mortgages and sell them off to investors, a process known as securitization. But when the securitization market abruptly turned in late 2007, Mayer Brown had just brought on 98 American associates and had already committed to 100 more the following year. In 2008, the crisis spread from the financial markets to the entire economy, and the firm had no choice but to clean house.

Even so, the taboo remained. Mayer Brown only acknowledged its first round of layoffs after a popular legal blog, *Above the Law*, posted rumors of them. It would take a few more months for the industry to get over its queasiness –specifically, until February of 2009, when the venerable corporate firm Latham & Watkins announced it was cutting 190 of its own. The firm's name abruptly entered the legal lexicon as a verb: "to be Lathamed." But whatever ill will it generated, the firm's move had the effect of giving cover to its too-proud competitors. "Latham was regarded as one of the most successful firms in the world and one of the best run," says Tom Goldstein, who recently

ran the litigation department of Akin Gump, a large Washington firm. "[After Latham], that stigma was gone." Mayer Brown would have two more waves in 2009 and 2010.

The firm was relatively generous to the associates it fired. It typically gave them three months' salary and benefits. It let them work from their offices while they looked for jobs and provided them with career-counseling services. After the second round of layoffs in 2009, it tried to avoid a third by placing associates in-house with major clients and paying them $60,000 plus benefits for a year, in the hope that the client would hire them permanently. The blow to morale was nonetheless enormous. "Once you have one round, pretty soon you're cutting into good people," says a former associate. "There was almost a survivor mentality–sort of guilt mixed with rage. ... The partner at the top made the choice of who stays, who goes. It colors your view of that person."

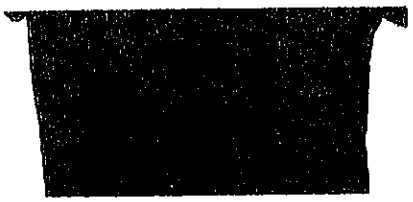
Over time, the remaining associates began to subtly turn on each other. J. Davidson started in the firm's finance practice in September 2007. Initially, there was enough work to keep associates busy, and they would beg off less desirable assignments. "It was like, 'Who wants to do that?' and you'd pause and stare at each other," says Davidson. Once the bottom completely fell out in 2009, however, associates would lunge for even the most tedious tasks. "You were lobbying for the work before it was even happening."

Davidson's mentor had recently moved to the firm's Charlotte office, making it even more difficult for him to score assignments. Face time, always a crucial commodity in law firms, became oppressively so. Every day, he would make the rounds of the partners in his practice to let them know he was free. And, almost every day, they would give him the runaround: "They'd say, 'Give me a call later.' I'd call later, and they'd said, 'Ehhhh.'"

Somewhat perversely, when associates like Davidson finally did get an assignment, it became more important than ever to turn it around quickly. The faster you worked, the less you appeared to have on your plate, and the

more partners might send your way. Even if a partner gave you several days to complete the task, the last thing you wanted to do was take the whole time. Suddenly, a new phenomenon was born: The gratuitous all-nighter.

And then there was the nagging fear that one day a partner would drop by your office and, instead of handing out an assignment, would shut the door and explain apologetically that the firm was staffing down. In normal times, getting fired wouldn't be the end of the world. But in the middle of a brutal recession, it could be disastrous: Every other major law firm was laying off associates. Corporations were slashing their in-house legal staffs. "There was no place for people to go," says a former associate. Even contract work was unavailable: The staffing firms often deemed the out-of-work associates "overqualified."



Art Streiber

In May, I spoke to a former Mayer Brown associate who joined the firm's finance group out of law school in 2001 before transferring to the pensions department so she could work saner hours. The associate, call her Helen (not her real name), survived two rounds of layoffs, then got pregnant in 2009. Helen had previously felt she was on track to make partner–her performance reviews were consistently strong–but she began to worry as she was preparing to go on maternity leave. "We would have these group meetings where we'd talk about billable hours, how down they were for our group. I knew that, if there was another layoff, we were going to be hit."

Helen's son was born on March 19, 2010. Just before he turned three weeks old, she received the call she'd been dreading. Mayer Brown gave her the rest of her maternity leave, plus another three months pay as severance. It was, under most circumstances, a fair offer. But Helen was in a bind. Her husband was a stay-at-home dad, and the couple owned a condominium in downtown Chicago. "I sent out a ridiculous number of resumés," she says. "If I didn't have a job lined up by time the time the severance ended, I didn't have a way to make payments on my house." She landed two or three interviews and no offers. "The market was so bad in the spring of 2010. Not a single law firm was hiring."

Inevitably, the bank foreclosed on her condo. She and her husband relocated to the Michigan town where he grew up, and she eventually joined a local firm. Her annual salary when she left Mayer Brown was $230,000. Last year she made $40,000. It was barely enough to put food on the table and clothe her children, much less keep up with tens of thousands of dollars in law school debt. "There's probably a bankruptcy in our future. I don't think

there's a way out of it," Helen told me. "In ten years, hopefully we'll be financially recovered, we can buy a house, have a credit card again." Before we hung up, I pointed out that the legal market had improved since 2010. Why not look for another fancy job in Chicago? "There's no way I would go back to Big Law," she said. "I'm doing a lot of criminal law now. I love it. It's originally what I'd intended to do when I went to law school."

In late June, I traveled to the Chicago headquarters of Mayer Brown to meet with the company's chairman, Paul Theiss. The firm moved into the gleaming 48-story Hyatt Center a couple years before the recession. At the time, it occupied twelve floors and had an option to lease more. As of this year, it hadn't exercised the option and had even shed a floor. An associate who left in 2012 estimated that, before the firm gave up that floor, there were five attorneys in a space that could accommodate more than 50.

The firm had resisted making any member of management available to me for weeks, and when I finally did turn up, Theiss's team seemed to be on edge. He was flanked by the company's marketing director, Peter Columbus, and head of public relations, Bob Harris, in a conference room on the thirty-second floor. As I entered, Harris invited me to have a seat in a chair next to a large brown accordion folder. It was packed with documents attesting to the firm's basic humanity—promotional literature, industry reports, press clippings. The three of them spent a good 45 minutes reviewing it before I could get off a question I'd prepared.

Theiss, who just finished his first year as chairman, was jacketless, with weary eyes and a throaty voice. He had a winning blue-collar affect—similar to a police lieutenant's or fire captain's—that was at odds with his corporate-lawyer resumé. I could immediately see the appeal of anointing him chairman after years of internal strife: He is someone who, by his mere presence, makes you feel embarrassed to lobby on your own behalf. When I alluded to "income partners," Theiss interrupted and said, "partners, we're all partners." He invoked the word "team" several dozen times during our two-and-a-half-hour conversation, only part of which was on the record.

More than anything else, Theiss was at pains to transmit an upbeat image of life at Mayer Brown. In his telling, associates are energetically nurtured–he had just returned from an associate retreat in Virginia where he spoke about career development–and they have a better shot of being promoted than at competing shops. As for partners, he said: "We regularly have people approach us from other firms who are very unhappy with exactly what you're describing, who not only hear about the way we do things here, but when they get here, they invariably are happy that it's actually true. That there is a premium on teamwork and cooperation."

There is certainly some evidence to support this. The firm's Washington office, with its prominent Supreme Court practice and antitrust lawyers, has been notably cohesive for years. Some industry-wide surveys of associates rate life at Mayer Brown very highly (though others give it middling grades). Still, it was hard not to feel as though we were talking past each other. Theiss seemed most eager to show how favorably Mayer Brown compared with its competitors when it came to its lawyers' personal fulfillment. I was, in turn, happy to concede that Mayer Brown was no laggard in this respect, and in many ways above average. That was, in fact, the point. If Mayer Brown is what passes for civility, then what should we make of the rest of the profession?

In any case, the real question hanging over the conversation was economic. If corporate America continues to be so stingy in its legal spending, Theiss could be as well-intentioned as a Peace Corps volunteer and still not have much to offer his lawyers beyond competently managed decline–charging clients the same for more work, or less for the same work; shedding bodies, or keeping the same number and paying most of them less. Theiss talked excitedly about "the drive for efficiency." But it was hard not to see this for what it is: the further immiserization of the legal class.

It was only when I suggested that a mere fraction of the world's Big Law firms would survive another decade or two that I grasped the bone-fatiguing chore of running such a business. Theiss wouldn't endorse the premise, but he

didn't exactly refute it, either. Demand had stopped growing, he told me. There was "substantial overcapacity." Billable hours were way down industry-wide. "I don't think anybody who follows the profession would suggest that this is only a temporary situation," he said. The longer Theiss spoke, the bleaker the picture became. Finally, Columbus, the marketing director, attempted to steer the discussion in a more upbeat direction.

"I think it's fair to say as well, as the general economy improves ... legal demand should increase," he interjected brightly.

But Theiss cut him off. "Uh, OK," he said, looking rather skeptical. "I mean, maybe."

Noam Scheiber is a senior editor at The New Republic. Follow @noamscheiber.